No. 08-1560

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM B. JOLLEY - PETITIONER

VS.

U. S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT -

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM B. JOLLEY

305 BURFORD ROAD

BRUNSWICK, GEORGIA 31523

912-222-1660 OR 912-267-7123

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did Federal Circuit Rule 32.1 and Federal Circuit IOP-10 [1] violate the Rules Enabling Act 28 U.S.C. 2072 and Petitioner's right to due process under the Fifth Amendment by establishing one class of decisions defined as "precedent" and a second class of decisions defined as "non-precedent" resulting in an unconstitutional abdication of the rule of stare decisis [2] ?
2. Did the Federal Circuit follow its own written and published rule [3] in deciding whether this decision was "precedent" or "non-precedent"?
3. (a) Did the Uniformed Services Employment and Reemployment Rights Act (USERRA) at 38 U.S.C. § 4302(b) supersede a "Settlement Agreement" and/or a "Collective Bargaining Agreement"?

   (b) Did the Federal Circuit make a valid decision that the "***dual announcements***", complained of by petitioner, were legitimate under the USERRA [38 U.S.C. 4301-4333] where the Federal Circuit referenced only the VEOA law [PL 106-117; 5 U.S.C. 3304(f)] to support a decision that the "dual announcements" complained of could not violate the USERRA?

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[1] IOP: referring to rules published and designated as "Internal Operating Procedures"

[2] See Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir. 2000), vacated by 235 F3d 1054 (8th Cir. 2000).

[3] Referring to Federal Circuit Internal Operating Procedure number IOP-10.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit appears at **Appendix A** to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was 18 November 2008.

A timely petition for rehearing was denied by the United States Court of Appeals on 13 January 2009, and a copy of the order denying rehearing appears at Appendix B (page A-9). *NOTE: Reference to Appendix is by page number:* (A-1); (A-9); (A-33); *etc.*

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution ...5th Amendment (Due process provision)

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

5 U.S.C. § 3304(f) (VEOA) Competitive service; examinations

> *(1) Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.*
>
> *(2) If selected, a preference eligible or veteran described in paragraph (1) shall receive a career or career-conditional appointment, as appropriate.*
>
> *(3) This subsection shall not be construed to confer an entitlement to veterans' preference that is not otherwise required by law.*
>
> *(4) The area of consideration for all merit promotion announcements which include consideration of individuals of the Federal workforce shall indicate that preference eligibles and veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service are eligible to apply. The announcements shall be publicized in accordance with section 3327.*

(5) The Office of Personnel Management shall prescribe regulations necessary for the administration of this subsection. The regulations shall ensure that an individual who has completed an initial tour of active duty is not excluded from the application of this subsection because of having been released from such tour of duty shortly before completing 3 years of active service, having been honorably released from such duty.

28 U.S.C. § 2072 Rules of procedure and evidence: power to prescribe at § 2072(b):

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

38 U.S.C. § 4302(b) [Uniformed Services Employment and Reemployment Rights Act (USERRA)]

United States Code, Title 38, Part III, Chapter 43, Subchapter I, § 4302 Relation to other law and plans or agreements; at § 4302(b) which reads:

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 3311(a) (USERRA) Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited:

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

5 C.F.R. § 1201.25 Content of agency response. (also at A-101))

> *The agency response to an appeal must contain the following:*
> *(a) The name of the appellant and of the agency whose action the appellant is appealing;*
> *(b) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;*
> *(c) All documents contained in the agency record of the action;*
> *(d) Designation of and signature by the authorized agency representative; and*
> *(e) Any other documents or responses requested by the Board.*

D.C. Circuit Court of Appeals Rule 32.1: See at Appendix N (A-98)

Federal Circuit Rule 32.1: Se at Appendix M (A-96)

Federal Circuit IOP-10; See at Appendix K (A-89)

3rd Circuit Court of Appeals IOP 5.7: See at Appendix O (A-100)

STATEMENT OF THE CASE

NOTE: *Reference to Appendix is by page number:* (A-1); (A-33); *etc.*

I

BACKGROUND

Petitioner is employed by the United States Department of Housing and Urban Development (HUD). Petitioner is the Director of the HUD office that serves the State of Idaho.

This action involves the two classes of decisions that the United States Courts of Appeal use: "non-precedential" decisions and "precedential" decisions (or the equivalents where alternative language describes the decision).

The Federal Circuit failed to follow its own rules (A-89) with respect to classifying its decision in petitioner's case and in a case (A-77) where an opposite result to petitioner's case was applied (both cases were decided on the same date (A-75) and classed as non-precedential).

The underlying case (A-19) involves the Uniformed Services Employment and Reemployment Rights Act (USERRA) . The interpretation of 38 U.S.C. § 4302(b) by the Federal Circuit (as applied to petitioner) is an incorrect reading of the plain language of the law.

Petitioner's original appeal was against the use of "*dual job announcements*" [1] for civil service positions by the Department of Housing & Urban Development (HUD) (A-19). The Federal Circuit based its findings (that dual announcements were not improper) on a VEOA case pursued under 5 U.S.C. § 3304(f)(1) (*Veteran may compete for vacant position where agency accepts applications from outside its own workforce under merit promotion procedures*). USERRA cases are pursued under the discrimination and reprisal provisions of 38 U.S.C. § 4311 (*Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited*).

HUD and other federal agencies use multiple announcements to improperly avoid federal government promises to veterans. [2] The promises, congressionally mandated in the United States Code, include those parts of the Code pertinent to preference eligible veterans and especially: 5 U.S.C. § 3309 (additional points for preference eligible veterans); 5 U.S.C. § 3312 (waiver of age and physical

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[1] The Federal Circuit referred to "dual announcements" in Dean v. Consumer Product Safety Commission, No. 2007-3038 (Fed.Cir. 2007). The Court said, " ... *the Board has never ruled on whether this procedure is acceptable* ...." The Federal Circuit concluded that the Board erred in declining Mr. Dean's request to consider the validity of the procedure as practiced by the agency. (see Appendix D at page A-24).

[2] By concurrently using the procedure prescribed by the Office of Personnel Management (OPM) for selection; and the procedure of the individual agency called the "merit promotion program"; and a third system for "non-competitive eligibles"; the agencies are able to selectively avoid veteran preference rules by using the "certificate" of eligible candidates that either does not contain a veteran or that does not have a veteran preference requirement. Once a Certificate of Eligibles" is created under OPM rules, that certificate MUST be used. 5 U.S.C. § 3318(a) – a law that has been regularly violated. HUD has violated the "pass-over law" as in the case cited by petitioner in his original complaint (USERRA appeal).

qualifications for preference eligible veterans); 5 U.S.C. § 3313 (registers of eligibles); 5 U.S.C. § 3318 (selection ... the "Rule of Three") ; 5 U.S.C. 3318(a) (the appointing authority shall select); and 5 U.S.C. 3318(b) (the veteran pass-over rule). ~~(See "constitutional and statutory provisions involved" at page 00)~~

Petitioner appealed to the Merit Systems Protection Board (MSPB) (A-19) and then to the United States Court of Appeals for the Federal Circuit.

Petitioner was rebuffed at each level of appeal. Petitioner knew from records released in his prior age discrimination suit (A-33) that the proof of discriminatory treatment (by the use of dual announcements) under the USERRA existed. The Merit Systems Protection Board (MSPB) administrative judge refused to require the government to produce various pertinent civil service documents that had been returned to the government (and made secret) under the terms of the settlement agreement. At each level, the MSPB judge decided that the agreement that petitioner had signed (A-63), to settle the age discrimination suit, blocked petitioner from obtaining the now secret personnel records. [3]

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[3] Does the USERRA at 38 U.S.C. § 4302(b) supersede a "settlement agreement and or a CBA"? 38 U.S.C. § 4302(b) (The USERRA) states: "(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

The MSPB judge also refused to require HUD to comply with the MSPB's own procedural rules that demands an agency produce *"material required by 5 C.F.R. 1201.25"* and *"copies of all other documents which are relevant and material to this appeal"*. See: (A-69), Motion for Subpoena and (A-71) Motion for Sanctions that petitioner submitted to try to obtain the documents that the agency is required by 5 C.F.R. § 1205.25 (A-101) to produce.

The decision by the Merit Systems Protection Board (MSPB) (A-11) said, *"the agency validly claimed that a settlement agreement signed by the appellant in 2004* (Appendix F) *contained a binding general release of 'any and all claims' prior to October 7 of 2004"*... and, the Federal Circuit agreed.

38 U.S.C. § 4302(b) (The USERRA) states: "(b) **This chapter supersedes any** State law (including any local law or ordinance), contract, **agreement**, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

The MSPB decision also said, *"...any USERRA complaint...would not be excluded from the negotiated grievance procedure contained in the parties' collective bargaining agreement..."* (See at top of page A-13). The Federal Circuit failed to apply its own precedent in deciding the validity of an agency's

interpretation of a statute as defined by Stephen W. Gingery v. Department of Defense, 2007-3292 (Fed.Cir. 2007)[4].

38 U.S.C. § 4302(b) (The USERRA) states: "(b) **This chapter supersedes any** State law (including any local law or ordinance), **contract, agreement, policy, plan, practice, or other matter** that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

The Federal Circuit directed the MSPB (in a "non-precedent" and unpublished decision) that a Collective Bargaining Agreement (CBA) would **not** supersede the USERRA in the case of Ernest Russell v. MSPB, case No. 2008-3106, (Fed. Cir. 18 November 2008) (A-77).

Petitioner asked the United States Court of Appeals for the Federal Circuit this question, "*"Does the USERRA law at 38 U.S.C. § 4302(b) supersede the petitioner's Settlement Agreement and/or any Collective Bargaining Agreement?"* The Federal Circuit responded in the negative. The plain language of the law states otherwise...and...the Federal Circuit failed to follow its own precedent in deciding the validity of an agency's interpretation of a statute (Stephen W. Gingery v. Department of Defense, 2007-3292 (Fed.Cir. 2007).

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[4] "[W]e must 'give effect to the unambiguously expressed intent of Congress'."

As to the base issue of "dual announcements", the Federal Circuit (A-5 at mid-page) stated that it had NOT addressed the use of dual announcements under the USERRA but it had evaluated the propriety of using such procedures under the VEOA [Veterans Employment Opportunities Act of 1998] [5]. The Court cited Joseph v. Federal Trade Commission, 505 F3d 1380 (Fed. Cir.) 2007. That case does NOT pertain to the situation as complained of under the USERRA by this petitioner. The proof of the difference (in addition to the difference between the VEOA law and the USERRA law) is in the now "secret" records that petitioner has seen in his age discrimination case (A-33 and A-63) [6] ... and that the government would not reveal even though required to do so by 5 C.F.R. § 1201.25 (A-101)... and...that the MSPB administrative law judge would not require the agency to do even when asked in two separate motions (A-69 and A-71).

II

THE ISSUES DEFINED

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[5] Petitioner argued for VEOA rights in William B. Jolley vs. Department of Homeland Security, 2007 MSPB 51, February 2007. That case substantially clarified veteran protections under the VEOA and was a case of interpreting the clear words of the law that agencies were avoiding.

[6] In the age discrimination suit of 2004, the U. S. District Court for the Southern District of Georgia had, upon a motion by petitioner, ordered HUD to provide the pertinent personnel and selection records. The records were not to be released to the public. The Settlement Agreement required those records be returned and all petitioner's notes or material pertinent thereto be destroyed. The MSPB judge refused to order production of those records for this USERRA case stating incorrectly that the Settlement Agreement superseded the USERRA.

1.

Petitioner asks the Supreme Court to decide that the Federal Circuit cannot make a "non-precedent" decision because non-precedential decisions represent an unconstitutional abdication of the rule of stare decisis. A non-precedential decision violates petitioner's right to due process under the 5th Amendment. A "precedent" decision provides a "first class" of justice or judicial decision. A "non-precedent" decision provides a "second class" of justice or judicial decision. The United States Constitution does not provide for a "second class" of "justice" or for two classes of judicial decisions.

The Preamble to the Constitution includes the purpose: to "establish justice". The Constitution's Article 5 commands "due process". [7] The Constitution, therefore, provides for only one class of judicial decision ... "justice". The use of "non-precedential" decisions is a violation of the "Constitutional commands" as well as an abdication of the rule of stare decisis.

2.

The Federal Circuit did not follow its own IOP-10 rule (A-89) in deciding whether the decision in Jolley v. HUD was "precedent" or "non-precedent". The

[7] Injustice was of great concern to the people of 1787. People looked forward to a nation with a level playing field, where courts operated with uniformity. Can we now say that every citizen has the opportunity for equal treatment if there are two classes of decision, "precedential" and "non-precedential"?

Federal Circuit is obliged to follow its own rules like all other decision making tribunals.

The Federal Circuit designated "Jolley v. HUD" (id.) a "non-precedential" case.

The Federal Circuit IOP-10 states the following reasons for designating a case as "precedential":

"(b) An issue of first impression is treated."

"(d) An existing rule of law is criticized, clarified, altered, or modified."

"(f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued."

Petitioner has been damaged by receiving a "second class" of justice by virtue of a non-precedential decision. The Court avoided consideration of the plain words of 38 U.S.C § 4302(b). The Court also ignored its own opposite decision in the Russell (A-77) case. The petitioner's case was not reviewed as a "precedential case" ... and neither was the opposite decision of the Russell case.

The Federal Circuit's IOP-10 (A-89), for precedential cases **only**, requires: *"... the STA shall provide information on potential conflicts between the panel-approved opinion and any other prior opinions of the court or other relevant precedents".*

Petitioner's case received a "second class" of treatment where there was no review for potential conflict with other relevant decisions.

The Federal Circuit violated its own rule (IOP-10) by not defining, and treating, the case as "precedential" by its own criteria.

3.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), at 38 U.S.C. § 4302(b), states, "*This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.* (Underline added).

The Federal Circuit decision in petitioner's case holds that a prior agreement of petitioner that settled an age discrimination case (A-63) precluded petitioner from obtaining or using certain HUD records to support his appeal under the USERRA. The plain words of 38 U.S.C. § 4302(b) are contrary to the Federal

Circuit decision that the Settlement Agreement (A-63) supersedes [6] the rights of the petitioner under the USERRA.

The Federal Circuit also decided that a Collective Bargaining Agreement (CBA) supersedes petitioner's rights under the USERRA (bottom of page A-6). The Federal Circuit took the opposite position (See position at page A-82) on the CBA (in the case of Ermea J. Russell vs. MSPB, No. 2008-3106 Decided the same day as petitioner's case.) The plain words of 38 U.S.C. § 4302(b) support the Russell v. MSPB action of the Federal Circuit. The plain words of 38 U.S.C. § 4302(b) are contrary to the Federal Circuit decision in the Jolley v. HUD case appealed here.

Decisions relating to 38 U.S.C § 4302(b) by several other federal courts of appeal (5th and 6th Circuits) are also at odds with each other and with the plain language of the law. Petty v. Nashville-Davidson County, 588 F.3d 431 (6th Cir. 2008) finds that 38 U.S.C. § 4302(b) (USERRA) supersedes any contract, agreement, policy, plan or practice. Garrett v. Circuit City, 449 F.3d 672 (5th Cir. 2006) finds that a contract to arbitrate supersedes the USERRA. Landis v. Pinnacle Eye Care, 537 F.3d 559 (6th Cir. 2008) finds that a contract to arbitrate supersedes the USERRA's plain language that states, "***This chapter supersedes***

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[6] 38 U.S.C. § 4302(b), states, "This chapter supersedes any ... contract, agreement, ..."

***any** State law (including any local law or ordinance), **contract, agreement, policy, plan, practice**, ..."*

Having blocked petitioner's use of pertinent records to prove what he knows to be true, by decisions that ignore the plain words of 38 U.S.C. § 4302(b), the Federal Circuit ruled that HUD's practice of using dual announcements did not violate the USERRA (**the Federal Circuit admitted, however, it had "*not specifically addressed the use of dual announcements in this context*."**) (at page A-5, mid-page).[9]

The Federal Circuit has no other decisions on the interpretation of 38 U.S.C. § 4302(b). **The use of a non-precedential decision ... Russell (id) decided one way and Jolley (id) decided opposite ... means that petitioner has been damaged where these non-precedential decisions ... each decided differently ... obviously create a second-class of justice where stare decisis and Constitutional commands are ignored.**

"The greatest tyranny has the smallest beginnings. From precedents overlooked ... springs the tyrannical usage. .:. The country has allowed it, and

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[9] Petitioner's appeal was that dual announcements to fill positions violated this veteran's (and other veterans) rights under the USERRA. The Federal Circuit opinion admits that "...we have not specifically addressed the use of dual announcements in this context..." (At p-4 of Appendix A); and also states, "...we need not address in depth whether the Settlement Agreement or the CBA preclude review of Mr. Jolley's USERRA claims." (At p-5 of Appendix A).

when it is at last provoked to a late indignation it finds itself gagged with the record of its own ill compliance." [10]

REASONS FOR GRANTING THE PETITION

NOTE: *Reference to Appendix is by page number:* (A-1); (A-33); *etc.*

I

There is disparity between the Circuits as to how they deal with precedential cases and non-precedential cases (*including the names they use to define the various types of decisions that they accept as precedent and those that are not acceptable as precedent*). The Circuits apply diverse rules about the precedential value of cases (See A-96, A-98 and A-100). That creates two levels of justice. [11]

Federal Circuit Rule 32.1 [12] (A-96) and Federal Circuit IOP-10 [13] (A-89) violate 28 U.S.C. § 2072(b) [14] and petitioner's right to due process under the 5th

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[10] On the need for eternal vigilance to protect liberty; from the Times of London, August 11, 1846. Extracted from the Wall Street Journal in "Notable & Quotable" on 10 March 2009.

[11] "Justice": The administration of what is just by the impartial adjustment of conflicting claims.

[12] Federal Rule of Appellate Procedure 32.1(a) states. *"Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007".*

[13] IOP refers to "Internal Operating Procedures". Petitioner assumes that the Federal Circuit is obliged to follow its own rules like all other decision making tribunals. See Hallard v. Commissioner of Internal Revenue, 544 U.S. 40 (2005); Service v. Dulles, 354 U.S. 363, 388.

Amendment by establishing (and or allowing) one class of decisions defined as "precedential" ; and a second class of decisions defined as "non-precedential". The result is an unconstitutional abdication of the rule of stare decisis and a provable lesser level (a "second class") in the quality of justice for non-precedential cases.

The Federal Circuit "... *will not give its own nonprecedential* [sic] *dispositions the effect of binding precedent....*" (Fed. Cir. Rule 32.1(d)) (A-96). The Federal Circuit refuses to depend on the quality and consistency of its non-precedential decisions for use as precedents. The Federal Circuit thus acknowledges that recipients of non-precedential decisions have received a level of quality, consideration and justice that is inferior to that provided in precedential cases.

The D.C. Circuit, in contrast to the Federal Circuit, accepts post 1-1-2002 unpublished cases as precedential. [15] (Note: The rule states 2002. This is not a misprint here) (A-98)

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[14] These Federal Circuit rules abridged or modified substantial rights of the petitioner. §2072(b) states: "*Such rules* (of procedure and evidence) *shall not abridge, enlarge or modify any substantive right...*" Federal Circuit rule IOP-10 is a rule of procedure.

[15] D.C. Circuit Rule 32.1(b)(1)(B): "*Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent.*" At: http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20%20RPP%20-%20Circuit%20Rules/$FILE/Rules2009Rev12009.pdf

Federal Circuit IOP-10 (A-89) is a "rule of procedure". Federal Circuit IOP-10 abridges and modifies the substantive rights of the petitioner by establishing method and process for two "levels of treatment" ... "*precedential cases*" (superior treatment) and "*non-precedential cases*" (inferior consideration and review).

The various federal courts of appeal differ in the use and application of "non-precedential" (or "unpublished") decisions. The D.C. Circuit (A-98) states that non-published" cases (subsequent to January 2002) may be cited as precedential. The Federal Circuit states (A-96) that non-precedential cases may be cited but shall have no precedential value. The 10th Circuit and 11th Circuit state that unpublished cases shall have no precedential value. The 7th Circuit states that the policy of the Court is to avoid unnecessary opinions and that "orders" are non-precedential and may not be cited (apparently despite Rule 32.1(a)). IOP 5.7 of the 3rd Circuit (A-100) tells us that you cannot cite non-precedential cases. The 3rd Circuit (in IOP 5.7) makes no reference to FRAP Rule 32.1 that allows citation of non-precedential cases after January 2007.

In 2008, 17 of 221 cases (7.7%) published on the Federal Circuit website relative to Merit Systems Protection Board (MSPB) cases were "precedential" cases. 204 cases (92.3%) were classed as "non-precedential" cases.

The Federal Circuit did not follow its own rule (IOP-10) in deciding whether the decision in Jolley v. HUD (and Russell v. MSPB) was "precedent" or "non-precedent". Petitioner assumes that the Federal Circuit is obliged to follow its own rules like all other decision making tribunals. see: Ballard v. Commissioner of Internal Revenue, 544 U.S. 40 stating: "*The Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules. See, e.g., Service v. Dulles, 354 U. S. 363, 388.*" See also: United States ex rel. Accardi v. Shaughnessy 75 S. Ct. 746, 349 U.S. 280 (U.S. 05/23/1955) ("the Accardi Doctrine")

The Federal Circuit designated Jolley v. HUD (Fed. Cir. 2008-3255) as a "non-precedential" case. The Russell v. MSPB (Fed. Cir. 2008-3106) case was designated non-precedential [16].

The Federal Circuit's IOP-10 (A-89) at par 2 states: "2. *The purpose of a precedential disposition is to inform the bar and interested persons other than the parties. The parties can be sufficiently informed of the court's reasoning in a nonprecedential* [sic] *opinion.*" This statement is nonsense; as is much of the

[16] Supreme Court Justice Samuel A. Alito chaired the Advisory Committee on the Federal Rules of Appellate Procedure. Justice Alito's committee pointed out that the E-Government Act of 2002 mandated the federal courts (trial courts as well as appellate) to place all their opinions on public Web sites in a text-searchable format – The Federal Circuit did not put the Russell case on its website.

reasoning behind having two classes of decisions. All cases are available to everyone.

The Federal Circuit IOP-10 (A-89) states the following reasons for designating a case as "precedential":

"(b) An issue of first impression is treated." The petitioner's case is one of "first impression" because the Federal Circuit has never previously ruled on the interpretation of 38 U.S.C. § 4302(b) in any published [17] case either in precedential or non-precedential format. The Russell case (Fed. Cir. 2008-3106) was so "dramatic" that it was widely cited by the media as an important change in USERRA interpretation.

"(d) An existing rule of law is criticized, clarified, altered, or modified." The petitioner's case resulted in an alteration of the Federal Circuit action with respect to the Russell case and the application of the CBA under the USERRA. The whole action of the Russell case was to clarify and alter an existing rule relative to interpreting the USERRA.

"(f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued." The petitioner's case resulted in

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[17] The Federal Circuit decision in the non-precedential Russell case was not published on the Court's own website. Petitioner originally found the Russell case in the news media as a substantial (precedential?) change to an MSPB decision that was appealed by Russell.

an actual conflict with the Court's action in the Russell (id.) case. The Russell case reversed a prior (non-precedential) ruling.

Federal Circuit IOP-10 requires: "*When all panel votes are in on a precedential opinion or order, the authoring judge circulates the opinion and any concurring or dissenting opinions, with a transmittal sheet, to each judge. A copy is also circulated to the senior technical assistant (STA), and the STA shall provide information on potential conflicts between the panel-approved opinion and any other prior opinions of the court or other relevant precedents.*" That process does not happen with a non-precedential case and thus there is a violation of the rule of stare decisis as well as the creation of a "second class" (or level) of decision-making and second class justice.

Petitioner has been damaged by receiving a "second class" of justice by virtue of a non-precedential decision. The Court avoided consideration of the plain words of 38 U.S.C § 4302(b) and the Court's own opposite precedent in the Russell (id) case. The Federal Circuit's IOP-10, for precedential cases **only**, requires: "... *the STA shall provide information on potential conflicts between the panel-approved opinion and any other prior opinions of the court or other relevant precedents*".

The review required by the Court's IOP-10 for precedential cases would have brought the deficient judgment to light and resulted in a correct decision.

Petitioner's case, instead, received a "second class" of treatment where there was no review for potential conflict or other relevant decisions.

In short, the Federal Circuit violated its own rule (IOP-10) by not defining, and treating, the petitioner's case as "precedential" by its own criteria.

3

Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) at 38 U.S.C. § 4302(b) supersede a "Settlement Agreement" and/or a "Collective Bargaining Agreement" (CBA)? (i.e.: "such contracts")

Mr. Justice Black, with whom Mr. Justice Frankfurter joins, dissenting in Shaughnessy v. United States ex rel. Accardi, 75 S. Ct. 746, 349 U.S. 280 (U.S. 05/23/1955), begin their dissent by saying: "*There is disagreement here as there was in the Court of Appeals as to precisely what was meant by our former opinion and holding in this case. Accardi v. Shaughnessy, 347 U.S. 260. This is not surprising in view of ambiguity of language at its best.*"

Fortunately, **there is NO ambiguity in the language of 38 U.S.C. § 4302(b)** which states: "*This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that*

--

reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

The Federal Circuit decision was not responsive to the language of 38 U.S.C. § 4302(b) which governs the Uniformed Services Employment and Reemployment Rights Act (USERRA) appeal in this case.

The Federal Circuit in Ernea J. Russell v. Merit Systems Protection Board, 2008-3106, (Fed. Cir. Nov 18, 2008) states: "***CBA grievance procedure mechanisms clearly fall within the meaning of a 'contract, agreement ... or other matter' that cannot 'reduce, limit, or eliminate' a petitioner's right to bring a USERRA ... claim.***" (See Russell v. MSPB at Appendix K, page 6) (A-82 at the last paragraph).

In petitioner's case (Jolley v. HUD, Fed. Cir. 2008-3106) the Federal Circuit stated: "***We have specifically acknowledged and enforced settlements of USERRA claims; thus, we find unpersuasive Mr. Jolley's argument that USERRA supersedes such contracts because they 'reduce, limit, or eliminate' USERRA rights.***"

BOTH THESE CASES, Russell and Jolley, WERE DECIDED ON THE SAME DAY by different panels.

"[A] jurist is not to innovate at pleasure," wrote Justice Cardozo. *"He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life."* (B. Cardozo, The nature of the Judicial Process [New Haven: 1921] 141).

The vagaries (erratic and/or unpredictable decisions) of the Federal Circuit in these two USERRA cases (Russell and Jolley) may be attributed to the fact that two separate panels made the decisions. The fact that the Federal Circuit has two levels of justice (precedent cases and non-precedent cases) violates the Court's responsibilities under the Constitution of the United States...and violates the rights of those individuals whose cases are, by law [18], decided in the Federal Circuit.

The Federal Circuit categorized petitioner's case as about "such contracts". Precedents (precedent cases at the level of the courts of appeal) in all federal courts of appeal for "such contracts" [19] under 38 U.S.C. § 4302(b) (USERRA) consists of three cases. There is disagreement about how 38 U.S.C. § 4302(b) should be

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[18] USERRA cases relative to federal executive agencies are heard by administrative judges and the only Article III court involved is the Federal Circuit for an appeal (38 U.S.C. § 4324(d)(1)).

[19] The term "such contracts" refers to the "Settlement Agreement" between petitioner and HUD to settle the age discrimination suit in district court in which petitioner received a GS-15 position, at a location of his choice, and $60,000. It also refers to a "Collective Bargaining Agreement" (CBA) which the MSPB said "might" have applicability in petitioner's case.

interpreted even under 38 U.S.C. § 4323 (Enforcement of rights with respect to a State or private employer) (See footnote 8):

Petty v. Nashville-Davidson County, 538 F.3d 431, (6th Cir. 2008) said: "Section 4302(b) expressly states that USERRA 'supersedes any ... contract, agreement, policy, plan, practice, or other matter ...'" and found for the plaintiff where the employer delayed reemployment and limited and withheld benefits to which plaintiff was entitled under the USERRA.

Garrett v. Circuit City, 449 F.3d 672, (5th Cir. 2006) said: "... we hold that USERRA claims are subject to arbitration under the FAA." The Court admits, however, that "legislative history of § 4302 confirms Congressional intent to forbid resort to binding arbitration. The following material is extracted verbatim from this case (bold emphasis is added):

> Legislative history of USERRA
>
> Garrett emphasizes, as did the district court, that a portion of the 1994 legislative history of § 4302 confirms Congressional intent to forbid resort to binding arbitration. The House Committee Report states:
>
> **Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights.** See Peel v. Florida Department of Transportation, 600 F.2d 1070 (5th Cir. 1979); Cronin v. Police Dept. of City of New York, 675 F. Supp. 847 (S.D.N.Y. 1987) and Fishgold, supra, 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. See McKinney v. Missouri K T R. Co., 357 U.S. 265, 270 (1958);

Beckley v. Lipe-Rollway Corp., 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. See Kidder v. Eastern Airlines, Inc., 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).

H.R. REP. NO. 103-65, 1994, as reprinted in 1994 U.S.C.C.A.N. 2453.4.

Landis v. Pinnacle Eye Care, 537 F.3d 559, (6th Cir. 2008). This case held that arbitration agreements were enforceable despite the clear words of 38 U.S.C. § 4302(b) to the contrary. The issue that this court misses is that the decision should have been relative to the words of 4302(b) which clearly say: "***This chapter supersedes any … contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, …***". How could Congress have been any clearer?

The plain words of the law are, "*This chapter supersedes any … contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, …***"** [20]

The Federal Circuit stated, "*Because we find that dual announcements do not violate USERRA* [21]*, we need not address in depth whether the Settlement*

[20] The Federal Circuit in Gingery v. Dept. of Defense, 2007-3292 states, "We review the interpretation of an agency's interpretation of a statute under Chevron U.S.A. v. National Defense Resources Council, Inc., 467 U.S. 837 (1984). "…we must give effect to the unambiguously expressed intent of Congress."

Agreement or the CBA preclude review of Mr. Jolley's claims." The Federal Circuit decision goes on to state. "*We have specifically acknowledged and enforced settlements of USERRA claims; thus we find unpersuasive Mr. Jolley's argument that USERRA supersedes* ***such contracts*** *because they 'reduce, limit, or eliminate' USERRA rights.*" (Emphasis added). **That statement in the decision makes no sense at all relative to "such contracts".** The statement about "such contracts" is not supported by any case citation. The Federal Circuit has never decided a 38 U.S.C. § 4302(b) issue about "such contracts" in a "precedent" case and does not refer to any case, precedential or not, where it has.

The writer and approvers of the Jolley v. HUD decision should have been warned by the Federal Circuit's Senior Technical Assistant (STA) that the Federal Circuit has never established a USERRA precedent that either violates or acknowledges the plain language of 38 U.S.C. § 4302(b) relative to "**such contracts**"[21]

Since this is a "non-precedential" decision, the protection of a review required for a "precedential" decision per Federal Circuit IOP-10 was not accomplished. Petitioner got a "second class" of decision [non-precedential].

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[21] The MSPB used the issue of "such contracts" (Settlement Agreement and CBA) to prevent petitioner from obtaining "secret" personnel records for information pertinent to the issue of dual announcements.

[22] The term "**such contracts**" refers to the "Settlement Agreement" from petitioner's prior age discrimination suit in district court; and to a "Collective Bargaining Agreement" (CBA) that the MSPB judge thought "might" be pertinent.

The Federal Circuit's own Internal Operating Procedure (IOP-10) states: *"When a nonprecedential* [sic] *opinion is approved by a majority of the panel and all panel votes are in, the authoring judge sends the opinion and any concurring or dissenting opinions to the administrative services office (ASO) for copying and delivery to the clerk for issuance. When all panel votes are in* ***on a precedential opinion or order****, the authoring judge circulates the opinion and any concurring or dissenting opinions, with a transmittal sheet, to each judge. A copy is also circulated to* ***the senior technical assistant (STA), and the STA shall provide information on potential conflicts between the panel-approved opinion and any other prior opinions of the court or other relevant precedents.*** " (Emphasis added).

The Federal Circuit, in its entire existence, has made only one other decision relative to the USERRA that pertains to **"such contracts"** as far as petitioner can determine. That was the non-precedential decision in the case of Ermea J. Russell v. Merit Systems Protection Board, [vacated and remanded, separate opinion by Dyk, J.], case number 2008-3106, 18 November 2008 ... the same day that the Federal Circuit decided petitioner's case. The Federal Circuit never posted a copy of the Ermea J. Russell case, or the separate opinion, on its own website.

But, you say... the appeal was about the propriety of dual announcements under the USERRA. But...the Federal Circuit decision states. *"Although we have*

not specifically addressed the use of dual announcements in this context ... we held that dual announcements do not run afoul of the VEOA ..." The VEOA is a completely different law from the USERRA; see: PL 106-117 as defined in 5 U.S.C. § 3304(f). But, this is a case about the USERRA under 38 U.S.C. § 4302(b) and the USERRA effect relative to "dual announcements". Petitioner is entitled to an appropriate USERRA related decision. But, the Federal Circuit has never made a decision about "dual announcements" under the USERRA and the FACTS of the petitioner's case.

The petitioner saw the "secret" personnel documents in his age discrimination case. That opportunity to have examined the "secret" personnel documents is the basis for his knowledge that dual announcements were used to violate petitioner's veteran rights under the USERRA (*a specific case about the director position in Indianapolis was cited by petitioner in his appeal but the administrative law judge refused to require the agency to produce the files*). The "secret" documents are the personnel files that the MSPB would not allow the petitioner to obtain from HUD despite the requirement of 5 C.F.R. § 1201.25 [21] that such documents, pertinent to the facts of the case, MUST be produced.

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[21] 5 C.F.R 1201.25: "The agency response to an appeal must contain the following: ... (c) All documents contained in the agency record of the action"

The Federal Circuit, itself, has said: "*5 C.F.R. §1205.25* [sic ... should read 1201.25] ... *requires the Department's response to the Board to contain "[a]ll documents contained in the agency record of action*" Gregory A. Lyons v. Department of Veteran Affairs, 2007-3314 (Fed.Cir.2007). Petitioner never got those documents that should have been produced as required by 5 C.F.R. 1201.25. Those documents were necessary to prove the case about dual announcements violating the USERRA.

The Federal Circuit states, "***Although we have not specifically addressed the use of dual announcements in this context***". The Federal Circuit also states, "***We have specifically acknowledged and enforced settlements of USERRA claims; thus we find unpersuasive Mr. Jolley's argument that USERRA supersedes such contracts because they 'reduce, limit, or eliminate' USERRA rights.***"

If the Federal Circuit has "***specifically acknowledged and enforced settlements of USERRA claims***" then where are the "precedent" cases upon which they based their decision?. Why did they decide the USERRA case of Russell v. MSPB opposite from Jolley v. HUD with respect to the CBA?)

So what do the Federal Circuit's words actually mean as a "decision" about either "dual announcements" or about "such contracts" relative to petitioner's appeal under the USERRA? **It means that the Federal Circuit has addressed**

neither the issue of "dual announcements" nor the issue of "such contracts" under the USERRA. **The Federal Circuit, by its own statements, has not made a decision on the USERRA issues appealed from the decision of the Merit Systems Protection Board in petitioner's case.**

Federal Circuit Rule IOP 9, paragraph 4, states, "*The court's policy is that all opinions and orders shall be as short and as limited to the dispositive issue as the nature of the cases or motions will allow.*" The court failed to follow its own policy (rule) and did not write a "short" opinion dealing with "the dispositive issues". The Federal Circuit NEVER dealt with the "dispositive issues" for a USERRA appeal. The court again failed to follow its own rule in not making both the Russell v. MSPB, (Fed. Cir. 2008-3106) case and the Jolley v. HUD (Fed. Cir. 2008-3255) case "precedent cases" where one case literally reversed the opinion of the other.

SUMMARY OF REASONS FOR GRANTING THE PETITION

First: There is substantial unjustified disparity between the rules of the various Circuits with respect to their treatment of "precedent" and "the rule of stare decisis". Petitioner's case was decided without respect for the "rule of stare

decisis" and the right to "due process". Petitioner received "second class" justice not sanctioned, envisioned, or allowed by the Constitution.

Second: The Federal Circuit did not follow its own rules in deciding that petitioner's case should be classed as a non-precedent case.

Third: The decision of the Federal Circuit that both the Collective Bargaining Agreement (CBA) and the Settlement Agreement supersede the USERRA is plainly disputed by the language of the law as well as by the Federal Circuit's non-precedential decision in Russell v. MSPB.

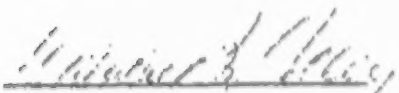
Fourth: The Federal Circuit did not decide the case based on the law under which the petitioner's case was filed (the USERRA). The decision was based on a different law...the VEOA (A-5, last paragraph on page).

Fifth: There has not been a valid precedential decision that the "dual announcements" complained of by petitioner did not violate this veteran's rights under the USERRA because the MSPB administrative law judge failed to require the agency to produce the records required by the law judge's (MSPB's) own regulation (5 C.F.R. 1201.25) (A-100). And, there is no precedential decision on the issue.

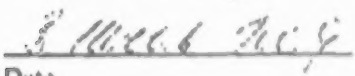
CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



William B. Jolley, pro se



Date

No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

WILLIAM B. JOLLEY - PETITIONER

VS.

U. S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT - RESPONDENT

_____

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3255

WILLIAM B. JOLLEY,

Petitioner,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

William B. Jolley, of Brunswick, Georgia, pro se.

Roger A. Hipp, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With him on the brief were Gregory G. Katsas, Assistant Attorney General, Jeanne E. Davidson, Director and Kirk T. Manhardt, Assistant Director.

Appealed from: Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3255

WILLIAM B. JOLLEY,

Petitioner,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Petition for review of the Merit Systems Protection Board in AT3443080162-I-1.

DECIDED: November 18, 2008

Before SCHALL, FRIEDMAN, and BRYSON, Circuit Judges.

PER CURIAM.

DECISION

William B. Jolley petitions for review of the final decision of the Merit Systems Protection Board ("Board") which denied his claim for corrective action brought pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Jolley v. Dep't of Housing & Urban Dev., No. AT-3443-08-0162-I-1 (M.S.P.B. April 29, 2008). We affirm.

hired, but they do not receive such points in the merit promotion process. With respect to the Program Advisor position, HUD made its dual announcement in 2002. Subsequently, the competitive announcement vacancy was cancelled, and the position was filled through the merit promotion announcement. Mr. Jolley argued before the MSPB that the dual announcement system itself violates USERRA.

The administrative judge ("AJ") to whom Mr. Jolley's appeal was assigned ruled that HUD's practice of using dual vacancy announcements did not violate USERRA. Jolley v. Dep't of Housing & Urban Dev., No. AT-3443-08-0162-I-1, slip op. at 2 (M.S.P.B. March 25, 2008). Further, the AJ determined that the Settlement Agreement precluded Mr. Jolley from raising claims which accrued prior to October 4, 2004, and that a collective bargaining agreement ("CBA") precluded some of the post-2004 claims. Id. The AJ's initial decision became the final decision of the Board on April 29, 2008, after Mr. Jolley declined to petition the Board for review of the initial decision. This appeal followed.

II.

We have jurisdiction over Mr. Jolley's appeal pursuant to 28 U.S.C. § 1295(a)(9) (2006). As stated in 5 U.S.C. § 7703(c), we must affirm a decision of the Board unless we find it to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. See Kewley v. Dep't of Health & Human Servs., 153 F.3d 1357, 1361 (Fed. Cir. 1998). We see no error in the decision of the Board in this case.

DISCUSSION

I.

Mr. Jolley is a preference eligible veteran currently employed by the Department of Housing and Urban Development ("HUD"). In 2003, he brought a claim in the United States District Court for the Southern District of Georgia based on his non-selection for various HUD positions for which he applied from 1994 until the date of the complaint. One of these was the position of Program Advisor, GS-0301-15. Mr. Jolley alleged that HUD had violated the Age Discrimination in Employment Act, 29 U.S.C. § 621–634 ("ADEA") by not selecting him for any of the positions. HUD settled the claim with Mr. Jolley on October 4, 2004. Jolley v. Jackson, No. 03-CV-39, slip op. at 1 (Oct. 6, 2004) ("Settlement Agreement"). Pursuant to the Settlement Agreement, HUD paid Mr. Jolley $60,000 and appointed him to a position as an operations specialist, GS-0301-15. Id. at 2. In return, Mr. Jolley agreed to "waive[] and release[] all claims arising from any facts . . . against [HUD] through the effective date of this Agreement." Id.

On November 26, 2007, Mr. Jolley brought an MSPB appeal, alleging that his non-selection for various positions, including the Program Advisor position, violated USERRA. For the positions at issue, HUD announced the vacancies via "dual announcements." In the dual announcement procedure, HUD advertises a position vacancy through a competitive examination listing, which is typically open to applicants from the general public, and also through a merit promotion listing, which is open to applicants already employed by the agency or applicants from outside the agency who have "status" in the competitive service. Veterans receive extra points in the competitive process, thereby boosting their scores and making it more likely they will be

III.

Mr. Jolley argues that the use of dual announcements violates USERRA. USERRA provides that a veteran "shall not be denied initial employment . . . on the basis of [military service]." 38 U.S.C. § 4311(a) (2006). We have interpreted a violation of USERRA to require "discriminatory animus"—in other words, a veteran must establish he was treated in a harsher manner than were non-veterans. Sheehan v. Dep't of Navy, 240 F.3d 1009, 1014 n.3 (Fed. Cir. 2001). Mr. Jolley argues that dual announcements violate USERRA because an agency can use the merit promotion list to ignore the veteran's preference and thereby manipulate the selection to avoid hiring a veteran. He does not contend, however, that his non-selection was the result of bias directed at him personally.

Although we have not specifically addressed the use of dual announcements in this context, we have evaluated the propriety of using such announcements in light of the Veterans Employment Opportunities Act, Pub. L. No. 105-339, 112 Stat. 3182 (1998) ("VEOA"). As opposed to USERRA, which simply provides that veterans may not be discriminated against, VEOA actually provides veterans a preference in hiring in certain circumstances. It is through VEOA that veterans receive additional points in the competitive hiring process.

In Joseph v. Federal Trade Commission, 505 F.3d 1380 (Fed. Cir. 2007), we held that the use of dual vacancy announcements does not violate VEOA. Mr. Joseph was a preference-eligible veteran who applied for a paralegal position through both the merit promotion and the competitive processes. Joseph, 505 F.3d at 1382. Although he was the top-ranked applicant on the competitive list (which reflected his veteran's

A5

preference), he was only one of the top four candidates on the merit promotion list. Id. Ultimately, the Commission hired someone who applied only via the merit promotion list. Id. Mr. Joseph alleged that he was denied his veteran's preference because the Commission used the merit promotion list to make the hire. Id. at 1383. We held that dual announcements do not run afoul of VEOA because "an agency has the discretion to fill a vacant position by any authorized method. 5 C.F.R. § 330.101; Sherwood v. Department of Veterans Affairs, 88 M.S.P.R. 208, ¶ 10 (2001)" and the merit promotion list is such a method. Id. at 1384 (internal quotations omitted).

Likewise, such announcements do not violate USERRA. USERRA requires equal treatment for veterans, while VEOA actually provides for a veterans preference in some circumstances. See, e.g., 5 U.S.C. §§ 3309–3312 (enumerating some forms of preferential treatment for veterans). The merit promotion list places nonveterans and veterans on equal footing, because it does not add preference points to any application. Thus, it cannot be said that veterans are treated "more harshly than non-veterans" through the use of dual announcements. Farenbacher v. Dep't of Navy, 85 M.S.P.R. 500, 510 (2000), aff'd sub nom Sheehan, 240 F.3d 1009. "The fact that [veterans] were not treated better than non-veterans does not show discrimination." Id. Mr. Jolley alleged no specific facts indicating dual announcements were utilized in a discriminatory way. Therefore, it was not error for the Board to deny corrective action.

Because we find dual announcements do not violate USERRA, we need not address in depth whether the Settlement Agreement or the CBA preclude review of Mr. Jolley's USERRA claims. We note, briefly, however, that Mr. Jolley only specifically alleges facts regarding the 2002 Program Advisor position. This non-selection was

covered by the Settlement Agreement, as it occurred before October 2004. We have specifically acknowledged and enforced settlements of USERRA claims; thus, we find unpersuasive Mr. Jolley's argument that USERRA supersedes such contracts because they "reduce, limit, or eliminate" USERRA rights. 38 U.S.C. § 4302. Although the settlement does not mention USERRA, it does release "all claims arising from any facts . . . through [2004]." Settlement Agreement at 2. We agree with HUD that the language of the agreement indicates that HUD did not intend to subject itself to multiple recoveries stemming from one non-selection. Therefore, Mr. Jolley's contentions as to the Program Advisor position are additionally barred by the Settlement Agreement.

IV.

Mr. Jolley also argues that the Board abused its discretion by failing to address his motion to issue a subpoena requesting documents pertaining to all dual vacancy announcements to which he responded from 1987 to the present. He also argues the Board abused its discretion by failing to rule on his motion for sanctions, alleging that HUD did not provide specifically requested documentation regarding dual announcements to which he responded from 1994 to the present.

The government responds that Mr. Jolley cannot meet his high burden of proving an abuse of discretion and substantial harm or prejudice from the Board's management of discovery. Curtin v. Office of Pers. Mgmt., 846 F.2d 1373, 1378 (Fed. Cir. 1988) ("This court will not overturn the board on such matters unless an abuse of discretion is clear and is harmful."). We agree. Mr. Jolley himself acknowledged that "the issue at stake is a matter of interpretation of law and should not rest upon the individual personal experiences or cases for validation." Complaint at 11 (Nov. 21, 2007). Documentation

relating to specific dual announcements would not help Mr. Jolley prove that the dual announcement procedure itself violates USERRA as a matter of law. Thus, Mr. Jolley has not shown neither an abuse of discretion nor substantial harm or prejudice resulting from the non-disclosure.

For the foregoing reasons, the final decision of the Board is affirmed.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-3255

WILLIAM B. JOLLEY,

Petitioner,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Petition for review of the Merit Systems Protection Board in AT3443080162-I-1.

ORDER

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NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Schall, Circuit Judge, Friedman, Circuit Judge, and Bryson, Circuit Judge.

A petition for rehearing having been filed by the Petitioner,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on January 21, 2009.

FOR THE COURT,

/s/ Jan Horbaly

Jan Horbaly
Clerk

Dated: 01/13/2009

cc: William B. Jolley
Roger A. Hipp

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

JAN 13 2009

JAN HORBALY
CLERK

JOLLEY V HUD, 2008-3255
(MSPB - AT3443080162-I-1)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

WILLIAM B. JOLLEY,
Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Agency.

DOCKET NUMBER
AT-3443-08-0162-I-1

DATE: March 25, 2008

William B. Jolley, Brunswick, Georgia, pro se.

Jeffrey J. Burns, Esquire, Atlanta, Georgia, for the agency.

BEFORE
Joseph E. Clancy
Administrative Judge

INITIAL DECISION

Appellant filed an appeal alleging that the agency's failure to select him for various positions was due to discrimination in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353 (codified at 38 U.S.C. § 4301 *et seq.*) (USERRA). For the reasons set forth below, appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

To establish Board jurisdiction over his USERRA claim, the appellant must (1) show performance of duty in a uniformed service of the United States; (2) allege a loss of a benefit of employment; and (3) allege that the benefit was lost due to the performance of duty in the uniformed service. *See Holmes* v.

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Department of Justice, 92 M.S.P.R. 377, 381-82 (2002). The appellant has shown that he performed in a uniformed service of the United States and he alleges, inter alia, the agency failed to select him based upon his prior military service. The appellant has therefore generally established Board jurisdiction over his USERRA claim. *See Yates v. Merit Systems Protection Board*, 145 F.3d 1480 (Fed. Cir. 1998).

Appellant has repeatedly claimed in his pleadings that the agency allegedly discriminated against him because of his status as a "preference eligible veteran" by utilizing the procedure of issuing dual vacancy announcements for each of various positions. Appellant used this same description in describing a putative class of individuals so affected. (Appeal File, Tab 11).[1] Indeed, appellant focuses on the "validity of the procedure" of using dual announcements, and references the Court's direction to the Board to address said procedure. *See Dean v. Consumer Product Safety Commission*, 106 M.S.P.R. 49, 52 (2007). The Board remanded that particular case to an Administrative Judge, but no precedential decision has yet resulted from that remand. Nevertheless, the Board has, in fact, spoken to the issue of said procedure, and has ruled that this practice does not violate the rights of a preference eligible veteran. *See Dean v. Consumer Product Safety Commission*, 108 M.S.P.R. 137, 142 (2008). While this decision was issued in the context of the Veterans Employment Opportunities Act (VEOA), it is of particular applicability given the analytical framework established by appellant, as noted above.

In addition to the case law cited *supra*, the agency validly claimed that a settlement agreement signed by appellant in 2004 contained a binding general release of "any and all claims" prior to October 7 of 2004. Accordingly, any vacancies identified by appellant prior to that date would be excluded from any

---

[1] Appellant's motion for class certification was denied, as was his request that I certify said ruling as an interlocutory appeal. (Appeal File, Tabs 13, 17 & 20).

possible consideration in this appeal. (Appeal File, Tab 3). Also, any USERRA complaints regarding vacancies for positions which would not be excluded from the negotiated grievance procedure contained in the parties' collective bargaining agreement would be subject only to said grievance procedure (Appeal File, Tab 14) See *Russell v Equal Employment Opportunity Commission*, 107 M.S.P.R. 171, 175 (2007). These "subgroups" are included in the overall group of positions identified by appellant as subject to the dual announcement procedure which, as noted above, has been determined to be permissible.

In summary, I conclude that appellant has failed to demonstrate that the agency discriminated against him on the basis of his prior uniformed service, and that he is not entitled to relief. *See Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed.Cir.2001).

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

Joseph E. Clancy
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 29, 2008, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition

for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which

the Board receives the document. . The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

U.S. MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419-0002
Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspb.gov

2008-3255

ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit Systems Protection Board in the appeal of William B. Jolley v. Department of Housing and Urban Development, MSPB Docket No. AT-3443-08-0162-I-1, and that the administrative record is under my official custody and control on this date

on file in this Board

June 27, 2008
Date

Tri Stewart
William D. Spencer
Clerk of the Board

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Before the

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

APPEAL UNDER THE UNIFORMED SERVICES
EMPLOYMENT AND REEMPLOYMENT ACT
(USERRA)

21 November 2007

William B. Jolley,
A "Preference Eligible" Veteran,
Appellant,

Vs.

Department of Housing and Urban Development,
Agency,

I

INTRODUCTION

1: Appellant states that the Agency (HUD) violated and "is about to violate" the Uniformed Services Employment and Reemployment Act (USERRA) in that the Agency, at various and numerous times from 1994 to the present and continuing, denied reemployment, and/or other benefits of employment in the classified Civil Service of the United States because of Appellant's status as a "preference eligible veteran". [1]

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[1] Title 38 > III > Chapter 43 > Subchapter II > § 4311
(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

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2. This appeal is of the "procedure" [2] (as well as applications made past, present and future) of using dual announcements in the avoidance of "the Rule of Three" and other preferences and protections that are provided to veterans under the USERRA.

3. The vehicle of discrimination is to make two announcements for federal civil service positions and then use only one of the resulting certificates of eligible candidates (and occasionally none) to avoid selection of the qualified veteran, all as more fully described below.

4. HUD utilizes a procedure of making two announcements for a position in the classified civil service. One announcement is under the "Delegated Examining Unit" (DEU) authority (open to all). The second announcement is under the Merit Promotion Handbook procedure (restricted to persons who can qualify under the HUD Merit Promotion Handbook, VEOA, VRA, etc. laws). The agency will then see if one or more veterans under the "Rule of Three" block a favored applicant on the DEU certificate. Where veterans block the favored candidate, the agency can often use the Merit Promotion procedure list or a "Certificate of Non-competitive Eligibles (based on the Merit Promotion applicants)" to reach the desired candidate. The DEU certificate is then not used.

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[2] An appeal may be moved when "(A) such employer has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter;" (and thus no particular "case" or "application" is needed where the procedure is ongoing and the Agency may be considered as "*about to fail or refuse*" to comply with the USERRA. See: 38 U.S.C. § 4322(a)(2)(A).

5. The alternative application of the use of two announcements for a single vacancy is to see that a veteran VEOA or VRA candidate on the Merit Promotion Handbook procedure "certificate" has more substantial qualifications than the preferred non-veteran candidate and then use the alternative "certificate" (from the DEU announcement) or cancel both announcements and make new announcements at a later date expecting the veteran will not continue to apply.

6. The Appellant states that the use of two announcements (DEU and Merit Promotion) for a single position is employed by HUD to deny veterans, including the Appellant, employment opportunities and related benefits otherwise available if a single DEU [3] announcement or a single Merit Promotion Handbook [4] procedure announcement is used. The use of two simultaneous announcements for the same position allows HUD to manipulate the results to discriminate against veterans.

7. Appellant alleges that the Agency makes a practice of discriminating against veterans as is evidenced by the statistics of the Office of Personnel Management (OPM). OPM statistics reflect that HUD has a veteran workforce population that is 45 percent lower than the "average" veteran population of all the Departments of the Executive Branch of the United States Government.

8. The official statistics of the Office of Personnel Management (OPM), available on the Internet, show that the average veteran percentage of total workforce

[3] Veterans are entitled, under a DEU announcement, to preference by the addition of five or more "points" to their rating for such a position.
[4] Veterans may benefit under a merit promotion announcement by virtue of VEOA and VRA qualifiers.

of the Executive Departments is 26.5 percent. The Department of Housing and Urban Development (HUD) workforce has 14.6 percent veteran population.[5]

9. Appellant states that he has been (and continues to be) discriminated against, by HUD's use of the dual announcement procedure, since 1994 [6] because of his status as a "preference eligible veteran"; and that the discrimination is accomplished in violation of the USERRA by HUD creating two announcements for a single position and then selectively using one-or-the-other of the announcements to avoid the "Rule of Three" and other veteran rights (VEOA, VRA, etc.) available under existing law.

10. HUD continues to use the procedure of dual announcements (DEU and Merit Promotion Handbook and multiple selection certificates for DEU, MSH, and Noncompetitive Eligibles) to discriminate against veterans despite the stated intent of Congress, and the pellucid wording of the laws Congress has passed, to provide benefits for veterans with respect to employment opportunities and the rewards therefrom. [7]

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[5] The OPM statistics cited are from "Table 8 – Federal Civilian Employment Distribution by Veteran Status, Executive Branch Agencies, Worldwide, September 30, 2004" (the latest statistics available on the Internet website of the OPM).

[6] Title 38 > Part III > Chapter 43 > Subchapter II> § 4324 (c)(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994.

[7] Title 38 > Part III > Chapter 43 > Subchapter II > § 4311: (c) An employer shall be considered to have engaged in actions prohibited— (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service...

II

DISCUSSION

11. The Appellant is currently a GS-0301-15 and was employed in this position in October 2004 by HUD.

12. The "veteran status-related" manipulation, for the purposes of this appeal, occurred between January 1, 1994 and October 6, 2004. The denial of the "other benefits" of employment, for purposes of this appeal, include the loss of time toward retirement; loss of step increases; loss of opportunities for other more attractive positions (both in the HUD organizational structure and in a number of other federal agencies [5]); and related issues during the period of current employment as well as during the prior years. All-in-all, the discriminatory treatment is a continuing matter and continues to date with the HUD still issuing, and relying upon, dual announcements to discriminate to the disadvantage of this veteran and all other veterans similarly situated.

13. The United States Court of Appeals for the Federal Circuit (Opinion by Circuit Judge Newman) in the case of Dean vs. Consumer Product Safety Commission, No. 2007-3038, discussed the issue of dual announcements. The Court states, "*The full Board denied review, with Chairman McPhie filing an opinion raising*

[5] Other agencies include the Department of Commerce with 12.8% veteran population, and Federal Emergency Management Agency with 9.7% veteran population (as examples of other agencies where applications were made). Only HUD is made "the Agency" for the purpose of this appeal despite the fact that similar manipulation is used by a number of other federal agencies to discriminate against veterans in the selection process.

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concerns about the use of two lists. He states that the Board has never ruled on whether this procedure is acceptable under federal employment law, and expresses concern that persons such as disabled veterans must either submit multiple applications or encounter the possibility of not even being considered for the announced position. However, the Board did not review the procedure, and sustained the dismissal." The Court of Appeals concluded that the Board erred in declining Mr. Dean's request to consider the validity of the procedure as practiced by the agency. The case was sent back to the MSPB for further consideration of the validity of the dual announcement process in view of the USERRA.

14. The MSPB (Before: Neil A.G. McPhie, Chairman; Mary M. Rose, Vice Chairman; and Barbara J. Sapin, Member) remanded the Dean case (ibid) back "to the regional office for further development of the record" and "*argument to address more fully the issues of whether creating multiple lists and selecting from only one violates veterans' preference laws or discriminates against veterans; and whether the agency's procedure, as applied to the appellant, violated his veterans' preference rights or USERRA.*"

The Dean case includes the issue of whether Dean should have applied under both announcements as was clearly stated in the announcements for those who wanted to be considered under both. The case being appealed by the undersigned Appellant has no such issue at stake.

The issue here is principally whether "the procedure" violates (and has violated and or will continue to violate) the rights of this veteran and the precepts of the USERRA when, as the USERRA states, "*the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action*." See Footnote 6 for the citation of law containing this wording.

III

ARGUMENT

15. "An employer shall be considered to have engaged in actions prohibited— (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services *is a motivating factor in the employer's action*, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service..." 38 U.S.C. § 4311 (c).

16. The action prohibited by the USERRA is: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service *shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer* on the basis of that membership, application for

membership, performance of service, application for service, or obligation."
See 38 U.S.C. § 4311(a).

17. Therefore, an action taken where the motivating factor is the presence of, or consideration of, a veteran, and where the action taken denies an employment benefit, is in violation of the USERRA.

18. The General Accounting Office (GAO) wrote the Office of Personnel Management (OPM) on August 22, 2003 about its investigation of HUD practices with respect to veterans. The subject of the correspondence is: "Review of Veterans' Preference and the "Rule of three". The General Accounting Office letter states: "Multiple certificates were used extensively". "Selections were made more often from certificates without veterans listed". An enclosure with the GAO letter reflects that the GAO reviewed 78 HUD announcements in which 26 veterans were the top candidates ... but only five of the veterans were selected. In 18 of the 78 HUD cases reviewed there was insufficient information to determine what had occurred. See also: GAO-03-966R, Veterans' Preference.

A CASE ON THE POINT (Appellant was an applicant).

Appellant applied to HUD for a GS-0301-15, Program Advisor position. The application was made by the Appellant under the Delegated Examining Unit (DEU) announcement

No. RE-DEU-2002-0114. The dual announcement under the Merit Promotion Handbook (MSH) program is RE-MSH-2002-0237.

The DEU announcement was cancelled. The MSH list was used to create a list of "Non-competitive Eligibles". There were 2 applicant's names on the Non-competitive list. There were 35 applicants on the DEU list. There were 29 applicants on the MSH list.

The selected person was already in the position on detail when the announcements were made. No interviews were conducted. There was an e-mail (internal to HUD) in which the responsible official wrote, "They already have a candidate in mind for this job". The selected person had applied under both announcements.

The selected candidate had applied under both announcements. He could not have been selected from the DEU certificate because he could not be reached in the face of two 10 point and four 5 point veterans (including Appellant) on the DEU list.

HUD's motivating factor to cancel the DEU announcement was the presence of veterans on the DEU certificate and the desire to select the non-veteran candidate that was not within reach on the DEU certificate because of the "Rule of Three".

An employer shall be considered to have engaged in actions prohibited— (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating

factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service...38 U.S.C. § 4311.

"ABOUT TO FAIL OR REFUSE" See: 38 U.S.C. § 4322(a)(2)(A).

Current HUD dual announcement not yet closed:

09-MSA-2008-0008: GS-1101-15, Multifamily HUB Director, Los Angeles, Ca.

09-DEU-2008-0008: GS-1101-15, Multifamily HUB Director, Los Angeles, Ca.

IV

COMPLIANCE WITH 5 U.S.C. § 1208.13

[CONTENT OF APPEAL AND REQUEST FOR HEARING]

19. *The following paragraphs comply with the requirements of 5 U.S.C. § 1201.24 (content of appeal).*

20. *Personal information:* William B. Jolley; 305 Burford Road, Brunswick, Georgia 31523; Telephone number: 912-264-5900. A preference eligible veteran having served in the USAF from 1950-1960.

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21. *The name and address of the agency that took the action:* Department of Housing and Urban Development, 451 7th Street, S.W., Washington, DC 20410

22. *Hearing:* Appellant does not request a hearing. The issue at stake is a matter of interpretation of law and should not rest upon the individual personal experiences or cases for validation. Appellant will, however, participate and provide argument for a hearing if that is desired by the MSPB to explore the issues.

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress had directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issues, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Reed v. Reno, 146 F3d 392, (USCA 6, 1998).

The USERRA is clear. The use of dual announcements is accomplished by agencies for the purpose of discriminating against veterans when selecting officials want to reach (on the Certificate of Eligibles or equivalent list) non-

veterans and/or to avoid "The Rule of Three" in a Delegated Examining Unit (DEU) announcement.

So far as this appellant has been able to determine, no agency has been able to present a credible purpose for the dual announcement procedure beyond veteran discrimination. Discrimination against the veteran is the sole purpose (To select favored non-veterans). Veteran status is the motivating fact in the employer's actions. The USERRA law is pellucid and such obvious discrimination against veterans violates the USERRA.

23. *Appellant believes that agency action is wrong because*: The USERRA states that if a person's status as a veteran is the motivating factor for the employer's action and the employer would not have taken the action except for the basis of "veteran status", then the employer has violated the requirements of the USERRA. HUD would not be using the dual announcement tactic except for the opportunity to avoid the "Rule of Three" and related veteran preference rules, regulations, and laws in order to select non-veteran candidates. The material in the "Introduction" part of this document is included herein as if it had been included within this paragraph.

24. *Statement of the action the Appellant would like the Judge to order:* The MSPB is asked to consider that HUD's actions in this matter are "willful" [9] as that term is defined by the United States Supreme Court.

Appellant asks the MSPB to Order that the Agency not use simultaneous dual announcements to fill positions. The MSPB is further asked to order that the Agency allow a minimum number of days (30-90?) between the non-use (i.e.: non-selection from the announcement) of one type of announcement and the re-announcement for the same position under the alternative procedure.

The MSPB is also asked to create such additional or alternative criteria as, in its judgment, will protect the rights of veteran applicants commensurate with the veteran laws.

Appellant further asks for an Order directing the Agency to compensate Appellant for loss of wages and benefits suffered by this veteran by reason of HUD's lack of compliance with the requirements of the USERRA.

Additionally, the MSPB is asked to Order payment of compensatory damages and punitive damages from 1994 to present [10] for HUD's misuse of position

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[9] Bock Dee, Petitioner V. Elaine L. Chao, Secretary Of Labor, 540 U.S. 614, 124 S.Ct. 1204, 157 L.Ed.2d 1122; "the term means 'without grounds for believing [an action] to be lawful, or by flagrantly disregarding others' rights under the Act'; ... see also ... Wisdom v. Department of Housing and Urban Development, 713 F. 2d 422, 424-425"

[10] Starting at the GS grade veteran qualified for in 1994: Compensation to be based on the difference between Appellant's actual earnings and that salary which he would have earned had HUD not used the

announcements and associated personnel operations to the detriment of the Appellant's rights as a veteran.

Finally, the MSPB is asked to Order payment to the Appellant for such other items as may be reasonable and allowed under the USERRA.

25. *Appellant's representative:* Appellant will act for himself (pro se).

26. *Notice of the decision being appealed:* Not applicable. Appellant takes this action directly to the MSPB as allowed by the USERRA [11]

27. *A statement telling whether the Appellant or anyone acting on his behalf has filed a grievance or a formal discrimination complaint with any agency regarding this matter:* No action under the USERRA on this issue has been taken by, or for, Appellant.

28. *Signature of the Appellant:*

William B. Jolley, pro se
305 Burford Road
Brunswick, Georgia 31523

"dual announcement tactic" to avoid compliance with veteran rights and benefits under the law. Difference to be determined based on Appellant's Social Security record of attributed earned income during the period at issue.

[11] Title 38 > Part III > Chapter 43 > Subchapter III > § 4324: Enforcement of rights with respect to Federal executive agencies. (b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board.

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BRUNSWICK DIV.

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CLERK
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

WILLIAM B. JOLLEY,

Plaintiff,

Vs.

CV203-039

Case number

MEL MARTINEZ in his capacity as Secretary of the Department of Housing And Urban Development (HUD),

THOMAS E. WHITE in his capacity as Secretary of the Army (Army).

Defendants.

2007 MAR 21 P 3:51

COMPLAINT

Comes now WILLIAM B. JOLLEY in the above styled case and states as follows:

APPENDIX E
PG. A-33

I

NATURE OF THE ACTION

1. This case originates as a matter of legally impermissible consideration of age in hiring. The action is brought under 29 U.S.C. § 621 et seq. and under the 5th Amendment and "the implied right to equal treatment under the law" as provided by the Constitution. The case involves matters under 5 U.S.C. § 702 in which agency officials have acted or failed to act in an official capacity and under color of legal authority and where there is a final action and no other review is available as with final decisions with regard to employment policies and actions.

2. The Department of Housing and Urban Development (HUD) has never hired an applicant who was age 65 or older. Selecting officials of the Department of Housing and Urban Development make decisions that promote and/or protect their self-interests by hiring from designated classes of people. The programs for favored designated persons do not include goals with respect to "age" in filling agency positions.

Equal Protection Argument?

3. The Department of the Army is not known to have hired any applicant 65 years of age or older. Army human relations (personnel) staff and DEU (Designated Examining Unit) staff rejected submission of Plaintiff's application to the selecting official because Plaintiff was considered too old for the job.

II

JURISDICTION

4. The United States District Court has jurisdiction under the provisions of the 29 U.S.C. sections 621, et.seq. 29 C.F.R. Part 1614.201 [29 U.S.C. Section 633(d)] requires that the EEOC have not less than 30 days of notice of intent to file a lawsuit under the ADEA. The 30-day notice requirement of the ADEA has been met. The EEOC sent Plaintiff a copy of its notice to the Army. EEOC has not provided Plaintiff with a copy of any notice that it may have sent to the Department of Housing and Urban Development (Henceforth "HUD"). A certified mail receipt is available as the evidence of notice with respect to both HUD and the Army.

5. The District Court has jurisdiction under 28 U.S.C. §1346 where the United States is a defendant; and under §1331 since there is a federal question under the Constitution (5th Amendment property rights and the implicit guarantee of equal protection of the laws), as well as under 29 U.S.C. § 621 et seq. The District Court also has jurisdiction under 5 U.S.C. § 702, in which an agency, officers or employees acted or failed to act in an official capacity and under color of legal authority and where there is a final action and no other review is available.

6. Venue in the Southern District of Georgia is proper under 28 U.S.C §1391(e)(3) where the Plaintiff maintains his residence and no real property is involved in the issue. In accordance with 28 U.S.C. §1391(e)(3), the summons and complaint may be delivered to the officer or agency by certified mail.

III

PARTIES

7. Plaintiff, William B. Jolley, is a former *career*[1] federal employee with the Department of Housing and Urban Development and with the Department of the Air Force. Plaintiff W.B. Jolley was born 20 September 1930. Plaintiff, at 72 years of age, is a protected individual under 29 U.S.C. § 621 *et seq.* Plaintiff Jolley has "*status*" as a "*career*" federal employee and is a "*reinstatement eligible*" and a "*preference eligible*"[2] for purposes of reemployment in the "*competitive service*" by *all* federal agencies. Plaintiff Jolley has held positions in the federal civil service that include the grades of

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[1] The term "career" employee under the federal civil service system has a special connotation and designates an employee and/or former employee as having certain special rights as the result of that status. Former *career* employees have added reinstatement rights with respect to reemployment in the federal service. *Career* employees with certain military service have additional rights that provide for reinstatement eligibility for life. Plaintiff Jolley, a veteran, *has lifetime reinstatement rights* to federal civil service and is elected as a "reinstatement eligible" former civil service employee with all the rights that such *status* provides.

[2] 5 U.S.C. Part III, Subpart B, Chapter 33, Subchapter I § 3316 defines "Preference Eligibles. Reinstatement. On request of an appointing authority, a preference eligible who has resigned or who has been discharged or furloughed may be certified for, and appointed to, a position for which he is eligible in the competitive service, an Executive agency, or the government of the District of Columbia." See also Sec. 3312 which waives requirements as to age, height, weight, physical condition, etc.

GS-9, GS-10, GS-11, GS-12, GS-13, GS-14 and GS-15. His last federal service was thirty years ago as the GS-15 Director of a HUD Field Office with a staff of 146 persons.

8. The 1st Defendant is Mel Martinez, Secretary of the Department of Housing and Urban Development (HUD). The Department of Housing and Urban Development has a civil service staff size that exceeds ten thousand employees. The 2nd Defendant is Thomas E. White as Secretary of the Army.

IV

BACKGROUND

10. Plaintiff, William B. Jolley, has applied for numerous advertised federal civil service positions in the *competitive service*. Plaintiff was qualified to hold the positions applied for and had previously held the same or similar positions. Plaintiff Jolley was not selected for any of the positions that he applied for.

11. Plaintiff Jolley, to check the possibility that the non-selection was the result of improper consideration of his age, applied for positions down to the

level of GS-9. None of the applications resulted in an offer of employment. The Army position implicated in this complaint is at the grade of GS-13. The HUD positions, applied for, range from GS-15 down to GS-9.

COUNT ONE

HUD POSITION AT DETROIT, MICHIGAN

12. HUD determined that Plaintiff is qualified for the GS-15 Field Office Director position at the Detroit HUD office. Plaintiff held the GS-15 position of HUD Field Office Director at Cincinnati thirty years ago. Plaintiff was twice interviewed by telephone for the Detroit position. The second telephonic "interview" was with the acting director (Diane Johnson) of the Detroit office. The acting director asked two questions and then proceeded to explain to Plaintiff how the Section 203(b) program had changed over the years. She was unaware that the plaintiff was the person who had originally suggested the changes in the 203(b) mortgage insurance program that she was "lecturing" on. She terminated the interview before she obtained any meaningful understanding of the scope of Plaintiff's experience and capacity. Her interview conversation indicated that she had made little or no effort to familiarize herself with the contents of plaintiff's

extensive resume' except with oblique references to applicants age by conversation about "changes over the years" and that "things are different now" and that *she* had "been with the agency for more than twenty years now". She appeared unaware that Plaintiff had maintained currency with HUD programs by having had contracts with the agency to provide services for HUD program activities in Florida, Oklahoma and Texas in recent years. Plaintiff was not selected for the Detroit position.

13. HUD is again recruiting to fill the Detroit Field Office Director position that it considered Plaintiff qualified to hold. Where no candidate was selected from the first recruiting effort then it is reasonable to assume that Plaintiff's age was the reason for the non-selection. Since no other candidate was selected there is no question of comparison of qualifications[3]. (Reference HUD position recruiting announcements HQ144092 (July 2002), 00-DEU-02-0011 (June 2002), 00-MSC-03-0007 (January 2003), and 00-DEU-03-0007 (January 2003). The non-selection of plaintiff was the result

[3] The positions being discussed are in the "*competitive service*" which requires the selection of employees on the basis of merit (qualifications) only. There can be NO consideration of outside factors such as political recommendations, etc. according to the regulations and law applicable to civil service positions in the competitive service.

of legally impermissible consideration of age in the evaluation of qualifications.

COUNT TWO

HUD POSITION AT NEW YORK, NEW YORK

13. The HUD position at New York is that of Deputy Regional Director at grade GS-15. The duties, responsibilities and technical knowledge requirements of the position are similar to those of the position of Field Office Director previously held by Plaintiff. Plaintiff was not interviewed as a result of the first announcement of the vacancy. Plaintiff was telephonically interviewed in response to his second application. The telephone interview included the Regional Director and the Field Office Director of the Albany Office[4] as well as several others on a "conference call".

[4] Plaintiff had, thirty-some years ago, served as the acting Field Office Director of the Albany operation while he was serving as a special assistant to the New York State Director of the Federal Housing Administration (FHA was absorbed by the HAFFA which later became HUD).

14. During the telephone interview the Albany Director referred to the fact that Plaintiff was an active pilot with a commercial pilot license. The Albany Director stated that he too had been a pilot. His following comment was "I want to get back to flying before I kick-off too". After a moment of silence the conversation continued with no further reference to age. The Plaintiff has not been hired for the New York position because of impermissible consideration of age in the selection process.

COUNT THREE

HUD POSITIONS AT ORLANDO, RENO AND DALLAS

15. Plaintiff made application for the position of Field Office Director at Orlando, Florida; Reno, Nevada; and Dallas, Texas. For all three locations: (a) Plaintiff applied and was a qualified candidate; (b) HUD failed to select a candidate from the first announcement; (c) HUD advertised each position a second time and Plaintiff applied a second time; (d) *Plaintiff was not interviewed nor hired for any of these positions because of impermissible consideration of age.* The pertinent announcements were numbered: HQ144092 (July 2002); 00-DEU-02-0011 (June 2002); 00-DEU-2003-0004A (December 2002); and 00-MSC-2003-0004A (December 2002).

HUD has never hired an employee over the age of 65 years. Failure to interview, advise of outcome of recruitment, or to acknowledge receipt of application, is evidence of impermissible consideration of age in selection process.

COUNT FOUR

HUD FIELD OFFICE DIRECTOR POSITIONS AT NINE OTHER LOCATIONS

16. Plaintiff made application for the position of HUD Field Office Director at: Flint, Michigan; Tampa, Florida; Camden, New Jersey; Albany, New York; Cleveland, Ohio; Houston, Texas; Casper, Wyoming; Washington, D.C.; and Indianapolis, Indiana. The applications were made under announcement number HQ144092 (July 2002) and 00-DEU-02-0011 (June 2002). Plaintiff was never contacted for interview nor advised of any outcome by HUD. Plaintiff, *despite* "reinstatement eligibility" *for any and all of these positions*, was eliminated from consideration for all nine positions based on the impermissible consideration of age. HUD: (a) Failed to acknowledge consideration of Plaintiff's application for each position; (b) Failed to notify applicant of the outcome of recruitment for each position;

and (c) Failed to interview or make any other contact with Plaintiff with respect to each position. These failures represent evidence of impermissible consideration of age in the selection process.

COUNT FIVE

HUD FIELD OFFICE DIRECTOR POSITION AT HELENA, MONTANA

17. Plaintiff applied for the GS-15 position of Field Office Director for the Helena, Montana field office of the Department of Housing and Urban Development. The announcement numbers are 00-DEU-02-0016 (September 2002) and 00-MSC-02-0016 (September 2002). Plaintiff's application was not acknowledged nor was Plaintiff interviewed, nor hired, nor advised of the outcome of the recruitment process. Plaintiff was eliminated from consideration based on the impermissible consideration of age.

COUNT SIX

ANCHORAGE, HONOLULU, NEW ORLEANS AND LOS ANGELES

18. Plaintiff applied to the Department of Housing and Urban Development for the GS-1101-14/15 positions of Director, Office of Public Housing in the cities of: Anchorage, Alaska; Honolulu, Hawaii; New Orleans, Louisiana; and Los Angeles, California. The HUD personnel office notified plaintiff that he met the qualifications to be employed in all these positions. Plaintiff was telephonically interviewed for the Los Angeles position. The interviewer stated that the Los Angeles office was the largest and most demanding of the four offices. There was no question about Plaintiff's qualifications to hold the position. Plaintiff was not selected nor advised of any result with respect to the Los Angeles office. Plaintiff was not interviewed nor selected for any of the other positions. The pertinent announcement numbers are: RE-MSH-2002-0272; RE-DEU-2002-0149; RE-DEU-2002-146; RE-MSH-2002-0269; RE-DEU-2002-0147; RE-MSH-2002-0270; RE-MSH-2002-0275; RE-DEU-2002-0151 (September-October 2002). The position at New Orleans was not filled from the first announcement and was re-advertised in 2003 under announcements RE-

DEU-2003-0022 and RE-MSH-2003-0036 (February 2003). Plaintiff has made application under the 2003 announcements. HUD did not select Plaintiff under any of the 2002 announcements due to impermissible consideration of age.

COUNT SEVEN

OTHER HUD POSITIONS APPLIED FOR

19. Plaintiff made application for the following HUD positions during the last half of 2002 to February 2003 [not mentioned in prior Counts above]:

Supervisory Operations Officer: Chicago, IL. GS-15, HQ147844

Housing Project Manager: Washington, GS-13/14, RE-DEU-2002-0116z,

Program Analyst: Washington, DC, GS-14, RE-DEU-2002-0016z

Special Assistant: Washington, DC, GS-15, RE-MSH-2002-0165

Enforcement Analyst: Washington, DC, GS-9/11, RE-DEU-2003-0004z

Single Family Housing Specl: Los Angeles, GS-13, 08-DEU-2002-0029z

Single Family Housing Specl: Los Angeles, GS-13, 08-MSD-2002-0058z

Project Manager: New York, GS-9/11/12, 07-DEU-2003-0007z

Project Manager: New York, GS-9/11/12, 07-MSK-2003-0007z

Program Specialist: Washington, GS-09/11, 00-DEU-2003-0003

Program Specialist: Washington, GS-09/11, 00-MSC-2003-0003

Program Specialist, Washington, GS-12/13, PO-DEU-2002-0120

Director, (Space Mgt Div): Washington, GS-14/15, PO-DEU-2002-0075A

Director, Tech Ast Div: Washington, GS-15, GR-DEU-2002-0093

Director, Tech Ast Div: Washington, GS-15, GR-MSH-2002-0153

Director, OAMS: Washington, GS-15, PO-MSH-2002-0090A

Program Manager (Director): Washington, GS-15, PO-DEU-2002-0050

Program Advisor (M.F. Hsg): Washington, GS-15, RE-DEU-2002-0114

Management Analyst: Washington, GS-15, PO-MSH-2002-0103

Supv. Management Analyst, Washington, GS-15, RE-DEU-2002-0117

Supv. Equal Employment Manager: Wash, GS-15, GR-MSH-2002-0148

Supv. Contractor I R Spec: Philadelphia, GS-14, PO-DEU-2002-0056z [5]

20. Plaintiff made more applications to HUD than the combined list of the positions cited in this count and all of the other counts of this complaint that relate to HUD.[6] Plaintiff was never interviewed for any of the positions

[5] Plaintiff received notice dated 28 February 2003 that he was in the "best qualified group considered by the selecting official ... but not selected. No selection was made for the position.

[6] HUD usually recruits with two "announcements". One announcement is for "status" applicants only. A second announcement is for "all sources of candidates". Because the agency may choose which announcement to use to fill the position, it is usual for applicants who have "status" to apply under both

listed in this Count and was informed about the outcome of the recruitment effort in two of the listed cases where the agency cancelled the recruitment without stating a reason. The last listed item is covered in footnote number 5. The non-selection for any of the positions, and the cancellation of the two announcements, and the non-filling of the last listed position, was the result of impermissible consideration of the age of plaintiff. Failure to interview qualified older workers is evidence of impermissible consideration of age as a factor in hiring.[7]

21. A review of official government statistics available from the Office of Personnel Management (OPM) reveals that HUD has never hired a job candidate who was over the age of 70. The Government's own statistics, in fact, reflect that the Department of Housing and Urban Development has never *hired* a job candidate over the age of 65. There are several employees in the HUD staff of more than 10,000 employees who are over age 65 but

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announcements for any particular position. For this reason Plaintiff always applied under both announcement categories and not every such application is listed in this complaint.

[7] 5 C.F.R. 330.101 "Methods of filling vacancies. An appointing officer may fill a position in the competitive service by any of the methods authorized in this chapter. He shall exercise his discretion in each personnel action solely on the basis of merit and fitness and without the discrimination prohibited in Part 713 of this chapter."

they were *hired* many years before they reached that age. The Bureau of Labor Statistics states that nation wide labor force participation of men over age 65 is around 16%-18% and around 8%-10% for women over age 65. The HUD record is that only 243 people (less than three percent) of the HUD workforce is over 65 years of age...and...that does not speak to the issue of "*hiring*" those over 65 which the Department of Housing and Urban Development has not done at all.[1]

22. Based upon the available information and on the actions and statistics of the Department of Housing and Urban Development, Plaintiff states that HUD has engaged in a continuing program of impermissible consideration of age in recruiting and hiring employees. The inappropriate consideration of age in the employee selection process is a violation of federal statutes as well as a denial of equal protection of the law as guaranteed by the Constitution of the United States.

[1] 5 U.S.C. § 7201 defines "under-representation" as where a designated group within a category of civil service employment constitutes a lower percentage than the percentage within the labor force of the United States as determined by the most recent census or a survey under Title 13.

COUNT EIGHT

CONTRACTUAL OBLIGATIONS OF GOVERNMENT

23. The federal government devised a civil service commission to establish rules and programs to assure the quality of federal employees. That commission has evolved into the Office of Personnel Management (OPM). The government established a civil service system in which employees could attain a "rank" in which, by good service, they were designated a "*career*" employee". A "career" employee, like Plaintiff Jolley, was promised that if he should leave the federal service that he would be given special consideration for return to federal service. Serving a successful substantial probationary period in a "permanent" position paid for the promise of special consideration for reemployment rights that could be used for a specified period of time.

24. The United States Government made the promise of special consideration for reemployment even more substantial by offering an unlimited time during which the special rights to return to federal service could be used if the employee had made a commitment to national security by his service in the armed forces during time of armed conflict. Plaintiff Jolley has, through ten years of military service, earned that additional value

for the time during which his "reinstatement eligibility" can be used. *Plaintiff has earned lifetime reinstatement rights*. The Government's agencies have reneged on the Government's promise to the plaintiff for which the Government received valuable consideration.

25. The employment agreement as to reinstatement rights has been breached. The breach of the contractual agreement is a violation of the 5th Amendment that prohibits the deprivation of property without due process of law and prohibits the taking of private property for public use without just compensation. It is also a breach of the implied Constitutional right to equal treatment under the law. The government has reneged on the promise of reinstatement consideration for which it received valuable consideration. The contractual obligation (promise in return for valuable service) of the government (unless the government intended the "promise" to be purely illusory and of no value), to provide special consideration to plaintiff in reemployment, is the property of the plaintiff and thus is "private property"

26. Current federal employment procedures single out specific classes of individuals for special treatment for which they have no "earned" right. *Special treatment due to conditions of heredity, geography, and/or sex* under

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"equal opportunity" programs (as opposed to "*earned consideration*" by veterans[1], for example) does not, as administered by current programs, provide equal treatment under the law. The result of "equal opportunity" program "goals" for unearned rights is the diminishment of the opportunities for those with *earned* (contractual) rights. The enforcement procedures (related to the goals) that are being used to assure the implementation of special consideration for designated classes of persons adversely impact all of those outside of the designated classes.

27. EEOC Management Directive 714, promulgated in 1987, requires that executive departments and independent agencies in the federal government produce an "Affirmative Employment Plan *for minorities and women*" and hold their managers responsible for achieving the plan's objectives. According to HUD's AEP and related documents, all managers are instructed to "refer to the AEP goals and objectives before initiating [employment] actions." The managers are "held accountable for utilizing every hiring, promotion, reassignment and employee development opportunity for meeting the Department's [race and gender-based] goals."

[1] HUD application of veteran preferences has been substantially below that of other federal agencies according to available OPM statistical data.

Any HUD manager who fails "to take the necessary actions to ensure that [these] goals and objectives are achieved" receives an unacceptable rating in his performance appraisal, which may result in reassignment, grade reduction or removal.

28. HUD enforces the equal opportunity employment program for special designated groups based on sex, heredity and geographic origins. HUD takes "*remedial or disciplinary action with respect to managerial or supervisory employees who have failed in their responsibility*" to meet specified "goals" in "equal opportunity" hiring (24 C.F.R. Part 7, Section 7.10(c)). While *equal* opportunity is legally required, ***HUD's remedial and/or disciplinary regulation has resulted in diminishing the opportunities for older workers for whom the HUD AEP goals provides neither incentive nor disincentive for HUD managers and supervisors to properly consider.*** The HUD and EEOC *equal opportunity* goals enforcement program have resulted in substantial disincentives for HUD managers and supervisors to properly consider merit, older workers, obligations to veterans (earned rights), and (contractual) obligations to reinstatement eligible applicants.

29. Office of Personnel Management statistics relating to HUD employment demonstrate that the HUD AEP goals coupled with the disincentives have severely impacted the composition of the HUD workforce with a substantial bias toward employing those with *unearned* preferences obtained from heredity, geography and sex. The implementation of the EEOC/HUD AEP goals has diminished Plaintiff's opportunity for reinstatement, and right to lifetime reinstatement eligibility, to the vanishing point. Plaintiff's right to be selected without regard to age has disappeared under the enforcement of the HUD AEP goals. The adverse effect of the AEP goals is clearly evidenced by the OPM record of the statistical makeup of the HUD staff of more than ten thousand employees. The operational effect of the AEP goals has been to deny Plaintiff the right to be considered on the basis of merit and to have equal treatment under the law.

30. 42 U.S.C. § 2000e-2(a)(2) states in part: "It shall be an unlawful employment practice for an employer ... to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities". *The HUD AEP[4] instructs selecting officials to "refer to the AEP goals and objectives*

[4] The HUD Affirmative Employment Plan approved by the Equal Employment Opportunity Commission.

before initiating [employment] actions". This instruction violates the law because it requires the selecting official to "limit, (and/or) segregate, and (and/or) classify his employees and applicants for employment" before any hiring action. HUD should be enjoined from using the AEP.

31. According to OPM web site, there are three groups of candidates that an agency can choose from to fill a vacancy. Plaintiff Jolley is in that category that includes those people *who have "civil service status" and who are eligible "for noncompetitive movement within the competitive service" because they either now are or were serving under career-type appointments in the competitive service. These individuals are selected under agency merit promotion procedures and can receive an appointment by promotion, reassignment, transfer, or reinstatement.* (See the official government web site for the OPM, www.usajobs.opm.gov/ei55.htm, which contains this statement under the heading "Sources of Eligibles").

32. The defendants have breached the employment contract, as to reinstatement eligibility, by the failure to appoint Plaintiff under circumstances where he was the only qualified applicant, and/or the best

qualified, "*reinstatement eligible career candidate*"[11] for the position(s) being recruited for and/or by failure to give any consideration whatsoever for no reason supportable under applicable law.

COUNT NINE

ADEA COMPLIANCE AND ENFORCEMENT ISSUES

33. The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. Such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age. The Department of Labor and the EEOC state, "*because of these reason, requests for age information will be closely scrutinized to make sure that the inquiry is made for a lawful purpose, rather than for a purpose prohibited by the ADEA*". (Note: This information is extracted from the Department of Labor Internet web site.)

[11] 5 U.S.C. § 2301(b)(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

EEOC 4-27

34. HUD, Army, and other federal agencies generally demand that applicants include a DD-214 (military record) and an SF-50 (civil service record) as well as dates of graduation/attendance at high schools and colleges. Failure to include the requested document(s)/information is stated as cause for the agency to not consider the applicant. They also often (usually) ask for date of birth and race, etc. for "statistical" purposes. The specific dates of service, federal employment, and education are generally not germane to selection when a person has fifteen or more years of experience (unless they are used for age discrimination purposes). The verification of dates of service for eligibility for veteran "points" and/or civil service "status" can be obtained after selection and the candidate bears the risk of discharge if the application information about "status" or military "points" can not be verified upon acceptance for the position.

COUNT TEN

FAILURE TO CONSIDER PLAINTIFF'S APPLICATION BY THE ARMY

35. Plaintiff made application to the Army for a position at Savannah, Georgia under announcement number XBL034396. The position was that of

"Executive Assistant", GS-0301-12 with the Corps of Engineers. The Army notified Plaintiff that he had not been rated for the position. There was no reason for not rating and considering Plaintiff except to avoid employing him on the basis of age. The Army violated Plaintiff's rights and the civil service laws. The Army violated its own directive that all applications shall be rated before referral lists are issued by the personnel office (See Army MEMORANDUM FOR CONUS CPC DIRECTORS, Guidance Memorandum 01-11).

V

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks:

a. That Plaintiff receive an award of damages from the Department of Housing and Urban Development in an amount equal to that which he would have obtained from having been fully employed at the highest pay level of grade GS-15 and with subsequent promotions from the time of his 65th birthday to the present and additional damages in an amount to reimburse him for the lost vacation time, sick leave,

medical coverage, accrued retirement benefits and other benefits that Plaintiff would have received from such employment.

b. That the Department of Housing and Urban Development be directed to employ Plaintiff in a supervisory position at the level of the top step of grade GS-15.

c. That the Department of Housing and Urban Development be required to pay Plaintiff such additional amounts as may be awarded under the ADEA and other laws.

d. That an injunction be rendered to prevent HUD and the Army from asking for age information and documents containing age information[12] prior to the point at which a selection has been made and designated in writing. The most usual age related information now generally (and unnecessarily) collected with the application includes the DD-214 military record; SF-50 record of prior federal service; and dates of high school and college graduation.

e. That an injunction be issued to stop HUD from using an AEP that defines goals in such a manner as to reward or penalize selecting officials for hiring individuals from designated groups thus adversely

[12] Except for those positions that currently have age limits established by law.

affecting the propensity of agency officials to select strictly on the basis of merit as required by the law.

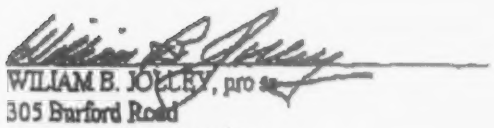
f. That an injunction be issued to stop HUD from applying the provisions of 24 C.F.R. 7.10(e) which provides for "remedial or disciplinary action with respect to managerial or supervisory employees who have failed in their responsibility" (with respect to numerical goals for hiring of designated groups) where said regulation has a chilling effect on the opportunities for employment of older applicants.

g. That an injunction be rendered to require HUD and the Army to staff their EEO organizations with diversity that is representative of the general makeup of the national population as a whole thus assuring a well rounded approach to the requirement for MERIT staffing as opposed to meeting, and exceeding, quotas that meet the desires of only a narrow segment of the population.

h. That the Army be required to offer Plaintiff a position at least equal to the one for which he received no consideration whatsoever.

i. That the Army be required to pay Plaintiff an amount that in the judgment of the Court is appropriate under the circumstances in which Plaintiff's application was never evaluated.

j. That the Court provide any and all other relief that in its considered opinion Plaintiff may be entitled to.



WILIAM B. JOLLEY, pro se
305 Burford Road
Brunswick, Georgia 31523
912-264-5900

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM B. JOLLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 03-CV-39
ALPHONSO JACKSON,	)	
Secretary of the Department of Housing	)	
and Urban Development,	)	
	)	
	)	
Defendant.	)	

Settlement Agreement

Plaintiff William B. Jolley, Jr. (hereinafter "Plaintiff") and the Defendant, Secretary Alphonso Jackson, as head of the Department of Housing and Urban Development (hereinafter "Department"), hereby enter into settlement in order to settle and compromise certain claims between them, including all claims, issues, complaints, or actions arising out of Plaintiff's Complaint, which was filed on or about March 14, 2003, in the United States District Court for the Southern District of Georgia (hereinafter referred to as the "Complaint"). Plaintiff and the Department ("the parties") hereby agree to the following:

1. In consideration of the other provisions of this Settlement Agreement, the Department agrees to the following:

GOVERNMENT EXHIBIT A

PAGE MISSING

a. The Department will appoint Plaintiff to a GS-15, Step 3 position as an Operations Specialist in the Department's Jacksonville, Florida Field Office, in the Office of Field Policy and Management, effective on or after October 4, 2004. The position is described in the Position Description attached hereto as Exhibit 1.

b. The Department will pay Plaintiff a lump sum of $60,000.

2. The consideration to be provided to Plaintiff in ¶ 1 is in full accord and satisfaction of all claims which were, or could have been, raised in the Complaint, including but not limited to all claims for injunctive or declaratory relief, damages, any other monetary relief, or other expenses, as well as in full satisfaction of all claims for costs, including any attorney's fees. Plaintiff hereby forever waives and releases all claims that he has alleged or could have alleged against the Department and any of its officials, employees, or agents, former or current, arising out of the Complaint, through the effective date of this Settlement Agreement. Plaintiff further forever waives and releases any and all claims arising from any facts, known or unknown, against the Department and any of its officials, employees, or agents, former or current, through the effective date of this Agreement. Such waiver and release includes but is not limited to any alleged violation of Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Rehabilitation Act of 1973; the Family and Medical Leave Act of 1993; the Age Discrimination in Employment Act of 1967 ("ADEA"); the Civil Service Reform Act of 1978 ("CSRA"); and the Fifth Amendment of the United States Constitution.

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3. The parties agree that Jolley v. Jackson, Civil Action No. 03-CV-39, is dismissed with prejudice as set forth in the Order of Dismissal signed by United States District Court Judge Anthony A. Alaimo on August 16, 2004 (attached as Exhibit 2).

4. This Settlement Agreement shall not constitute an admission of guilt, wrongdoing, or liability by the Department or any of its employees, past or present, nor shall it constitute evidence or an admission by any party as to any issue of law or fact raised by or about this matter. Further, the provisions of this Settlement Agreement are by agreement of the parties and will not serve as precedent, or otherwise be binding, in this or any other case, beyond the implementation of this Settlement Agreement.

5. Materials produced by the Department in discovery that were designated as protected materials under the Privacy Act and Rule 26(c) Protective Order in this action, and all copies thereof, will be returned to counsel for the Department within thirty (30) days after the execution of this Settlement Agreement. Any document created by Plaintiff or counsel retained by Plaintiff which contains or reflects protected materials will be destroyed by Plaintiff or such counsel within thirty (30) days after the execution of this Settlement Agreement. Plaintiff will certify in writing to counsel for the Department to the destruction of all such documents created by Plaintiff or counsel retained by Plaintiff within thirty (30) days after the execution of this Settlement Agreement. [TO BE DELETED UPON PLAINTIFF'S COMPLIANCE WITH THE TERMS OF THE PROTECTIVE ORDER.]

6. The terms of this Settlement Agreement constitute the entire agreement of the parties, and no prior statement, representation, agreement or understanding, oral or written, that

ASU A-[illegible]

is not contained herein shall have any force or effect. This Settlement Agreement cannot be modified except upon express written consent of the parties.

7. Plaintiff acknowledges that he has been given a reasonable time within which to review this Settlement Agreement, and understands that he has seven (7) calendar days within which to revoke his acceptance of this Settlement Agreement. Any such revocation will be made in writing and delivered to counsel for the Department on or before the seventh calendar day after Plaintiff has signed this Settlement Agreement. Otherwise, this Settlement Agreement shall become effective seven (7) calendar days after Plaintiff's signing of the Settlement Agreement. Plaintiff further represents that he has conferred with counsel prior to executing this Settlement Agreement, that he has examined and understands the provisions of 29 U.S.C. § 626, and that the requirements of those provisions are fully met and satisfied in connection with this Settlement Agreement.

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8. Plaintiff acknowledges that he has read this Settlement Agreement, understands the contents thereof, and executes this Settlement Agreement of his own free act and deed. The undersigned representative for the Department represents that he is authorized to enter into this Settlement Agreement. Counsel for Defendant represents that he is authorized to enter into this Settlement Agreement, and that the Department of Justice has authority to enter into this Settlement Agreement.

Dated: October 4, 2004

Christopher Hall
Attorney
Civil Division
U.S. Department of Justice

Dated: 30 September, 2004

Alan David Tucker
Law Office of Alan David Tucker

Dated: 10-6-04

U.S. Department of Housing and
Urban Development

Dated: 30 September 2004

William B. Jolley, Jr.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

WILLIAM B. JOLLEY,	)	
	)	
Appellant,	)	
	)	
Vs.	)	Docket No.
	)	AT-3443-08-0162-I-1
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
	)	
Agency.	)	

MOTION FOR MSPB TO ISSUE SUBPOENA

I. position applications that Appellant made to HUD since January 1987, where the agency issued both Merit Promotion Handbook and Delegated Examining Unit announcements ("dual" announcements), have inherently involved a violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

5 U.S.C. § 1201.25(c) requires the Agency response to contain "All documents contained in the agency record of the action". The MSPB Schedule 3443 contains a similar requirement for "Copies of all other documents which are relevant and material to this appeal". The Agency response did not contain the required documents.

The Agency response should contain "All documents in the Agency record of the action". The documents in the Agency records that are pertinent to how the Agency used the dual announcements are the various "certificates"[1] that were created from the

[1] The term "certificate" is intended to convey the idea of a list of names made up as the result of an announcement. It is used equally to identify such a list whether relating to the Delegated Examining Unit or to actions under the Merit Promotion Handbook.

APPENDIX G-

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applications received. The Agency, by the wording of 5 U.S.C. § 1201.25(c), should supply every certificate for every dual announcement recruitment that the Appellant made an application under (An application under either one or the other or both announcements). The Agency should also provide every associated document that relates to, or comments on, the candidates, and/or the "certificates", and the processes applied.

Appellant gives fair notice of the scope of the claim when he identifies "ALL" of the announcements under which he made an application since January 1987. The Agency is required by 5 U.S.C. § 1201.25(c) to respond with "All documents contained in the agency record of the action". The Agency records are the source of the information upon which the MSPB can make a reasonable determination as to what the Agency did with respect to the requirements of the USERRA.

Appellant moves this Honorable Board to issue a subpoena requiring the Agency to comply with 5 U.S.C. § 1201.25(c) to respond with "All documents contained in the agency record of the action" relative to each and every application of the Appellant that HUD's own records contain beginning 1 January 1987. Alternatively, to the issuance of a subpoena, the MSPB is asked to sanction the Agency for its failure to comply with 5 U.S.C. § 1201.25(c) and/or such other action as the Board may deem appropriate.

Respectfully submitted this 5th day of January 2008.

William B. Jolley

William B. Jolley
Appellant, *pro se*
305 Burford Road
Brunswick, Georgia 31523
912-264-5900 or 912-267-7123

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

WILLIAM B. JOLLEY,	)	
	)	
Appellant,	)	
	)	
Vs.	)	Docket No.
	)	AT-3443-08-0162-I-1
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
	)	
	)	
Agency,	)	

MOTION FOR SANCTIONS

1. The MSPB "Acknowledgement Order" dated December 3, 2007 states: "*If any party fails to follow my orders or the Board's regulations, I may impose sanctions pursuant to 5 C.F.R. § 1201.43.*" The "Acknowledgement Order" requires the Agency to serve ... (the Judge and Appellant) ... "*with the material listed in the enclosed schedule and any other information required by 5 C.F.R. § 1201.25 within 20 calendar days of the date of this Order*" [1] .MSPB Schedule 3443 establishes the "Requirements for the Agency File" and requires "*Copies of all other documents, which are relevant and material to this appeal.*" (Item 4 on the MSPB Form 3443).

[1] 5 C.F.R. § 1201.25: [Pertinent parts] Content of agency response. (b) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action; (c) All documents contained in the agency record of the action;

APPENDIX H-

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2. The Appeal states that the Agency violated Appellant's rights under the USERRA numerous times between 1994 and the present. The Appeal makes clear that the violations relate to all of the applications he made where the agency conducted the recruiting effort using two announcements (Designated Examining Unit and Merit Promotion Handbook).

3. The wording of the Appeal makes every recruitment under which Appellant made an application both "relevant and material" to this appeal. The "Acknowledgement Order" requires the Agency to serve ... (the MSPB and Appellant) ... "*with the material listed in the enclosed schedule and any other information required by 5 C.F.R. § 1201.25 within 20 calendar days of the date of this Order*". MSPB Schedule 3443 establishes the "Requirements for the Agency File" and requires "*Copies of all other documents, which are relevant and material to this appeal.*" (Item 4 on the MSPB Form 3443). 5 C.F.R. § 1201.25(c) requires: "All documents contained in the agency record of the action".

4. The Agency File that was submitted to the Board and the Appellant contains: (1) Agency Response/Motion to Dismiss; (2) Statement re: Collective Bargaining Agreement; (3) Statement re: No EEO Complaint of Discrimination; (4) Summons and Complaint [U. S. District Court from ADEA case by Appellant]; (5) Settlement Agreement [from District Court ADEA case].

5. The Agency file does not contain "all documents pertinent and material" to every application made by Appellant from 1994 to present where the Agency recruited using "dual" (simultaneous) announcements (Merit Promotion and DEU) [2]. The Agency file does not contain any documents pertinent to the one "example case" that is referred to in the Appeal. The Agency file does not comply with the Order of the Board or with the command of 5 C.F.R. § 1201.25(c).

6. Appellant respectfully asks the Board to sanction the Agency in accordance with 5 U.S.C. § 1201.43(a)(1) by drawing an inference in favor of the requesting party (Appellant) with regard to the information sought (required by law and by Order of the Board) that has not been provided. Appellant further asks the Board to sanction the Agency under 5 U.S.C. § 1201.43(b) for failure to defend the appeal; and subsequently to rule in favor of the Appellant.

Respectfully submitted this 2nd day of January 2008.

William B. Jolley, *pro se*
305 Burford Road
Brunswick, Georgia 31525

[2] It makes no difference whether or not Appellant applied under only one or under both of the announcements for any of the positions involved.

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TUESDAY, NOVEMBER 18, 2008

11:00 A.M.

NONPRECEDENTIAL OPINIONS

2007-7270 . STEVEN P. FERNANDEZ v. JAMES B. PEAKE, M.D., Secretary of Veterans Affairs
USCAVC Schall, J. Affirmed

2008-3255 WILLIAM B. JOLLEY v. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
MSPB Per Curiam Affirmed

2008-3305 WILLIAM B. JOLLEY v. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
MSPB Per Curiam Affirmed

ACTION IN PENDING CASE

2008-3106 ERMEA J. RUSSELL v. MERIT SYSTEMS PROTECTION BOARD, ET AL.
Vacated and remanded.
Separate opinion by Dyk, J.

DISMISSAL

2008-1310 ELANTECH DEVICES CORPORATION v. SYNAPTICS, INC., ET AL.

PETITION FOR REHEARING

2007-7150 ROBERT FIELDS v. JAMES B. PEAKE, M.D., Secretary of Veterans Affairs
Denied.

Information about opinions for the current week is available by calling the Court's Opinion Line at (202) 633-6002. The Court's opinions (both precedential and nonprecedential) are also available for downloading from the Federal Circuit web site: www.cafc.uscourts.gov

APPENDIX I

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NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3106

ERMEA J. RUSSELL,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor.

Petition for review of the Merit Systems Protection Board in AT3443040915-B-1.

ON MOTION

Before MAYER, LOURIE, and DYK, Circuit Judges.

Order for the court filed PER CURIAM. Separate opinion filed by Circuit Judge DYK.

PER CURIAM.

ORDER

Ermea J. Russell moves without opposition to reverse the Merit Systems Protection Board decision that determined that the board lacked jurisdiction over her Uniformed Services Employment and Reemployment Rights Act (USERRA) claim and to remand the case for a decision on the merits of her petition for review.

Russell, an officer in the Army reserves, was called up for active military duty while employed as a trial attorney with the Equal Employment Opportunity Commission

APPENDIX J

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(EEOC) at the agency's Jackson, Mississippi office. Upon her return after nearly two years of active duty, the EEOC immediately transferred Russell to its Birmingham, Alabama office. Russell invoke d a grievance procedure in a collective bargaining agreement (CBA) between her union and the agency to raise her claim that she was entitled to be reemployed with the agency's Jackson office. Her grievance was ultimately denied.

Russell then petitioned the board for relief, asserting that her transfer constituted a violation of USERRA and that she was entitled to reemployment under the statute. Her petition was initially denied by the Administrative Judge (AJ) on the merits, although the AJ raised the issue of whether Russell's grievance through the CBA was the exclusive remedy. The AJ cited as potentially applicable 5 U.S.C. § 7121(a), which governs CBA grievance mechanisms for federal employees and states in pertinent part that unless that statute otherwise provides, "the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

Russell petitioned the full board for review of the AJ's decision. On review, the board held that it had jurisdiction. Russell v. Equal Employment Opportunity Comm'n, 104 M.S.P.R. 14 (2006) (Russell I). The board primarily relied on the language of 38 U.S.C. § 4302(b), which provides that USERRA "supersedes any . . . contract, agreement, . . . or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter . . . ." The board concluded, inter alia, that "the agency and the union's failure to exclude USERRA claims from the CBA's grievance procedure constitutes an impermissible attempt under section 4302(b) to limit individual

USERRA rights by agreement." Id. Regarding the merits, the board remanded for the AJ to properly inform Russell of the appropriate burdens of proof in USERRA cases.

The AJ again ruled against Russell on the merits and Russell subsequently petitioned the board for review. The board sua sponte concluded that this court's decision in Pittman v. Dep't of Justice, 486 F.3d 1276 (Fed. Cir. 2007) required that the board dismiss Russell's case for lack of jurisdiction. In Pittman, this court held that 5 U.S.C. § 7121(e)(1) requires the board to dismiss for lack of jurisdiction a USERRA adverse action appeal if the employee first *elected* to grieve the same or similar matter through a CBA grievance procedure mechanism. Id. at 1282. The board noted that Russell's case differed from Pittman because Russell's case involves section 7121(a) rather than an election of grievance remedies under section 7121(e). Nonetheless, the board held that Pittman required dismissing Russell's petition without addressing the merits. Russell v. Equal Employment Opportunity Comm'n, 107 M.S.P.R. 171, 174 (2007) (Russell II). Russell timely petitioned this court for review.

Russell seeks reversal of the board's determination that it lacked jurisdiction to decide her USERRA reemployment claim. Whether the board has jurisdiction is a question of law that we review de novo. Yates v. Merit Sys. Prot. Bd., 145 F.3d 1480, 1483 (Fed. Cir. 1998). We note that, in the briefs filed by Russell, the board, the EEOC, and amicus curiae, it is unanimously argued that the board erred in determining that it lacked jurisdiction.

Congress has long provided reserve military personnel reemployment as a statutory protective right against potential disadvantages due to an extended absence while on active duty. See Nichols v. Dep't of Veterans Affairs, 11 F.3d 160, 162 (Fed

Cir. 1993) (describing history of military reemployment statutes). Congress and the courts have recognized that employer policies, agreements, and collective bargaining processes should not subordinate the ability of a reservist to return to a job after service. See, e.g., McKinney v. Mo.-Kan.-Tex. R.R. Co., 357 U.S. 265, 268 (1958) (holding that an employee claiming a violation of his reemployment rights under the Universal Military Training and Service Act could bypass a grievance procedure provided for in a CBA); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) ("[N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act").

USERRA, Congress's most recent enactment of service member reemployment protection provides:

> (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
>
> (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 4302 (a)-(b).

In its decision in Russell II, the board felt compelled to dismiss Russell's case because of our decision in Pittman. The board now states that Pittman does not control disposition of Russell's case. In the present case, the board's decision was based on

the holding in Pittman that a party who *elects* to grieve an *adverse action* under section 7121(e)(1) cannot later file a USERRA action concerning a similar matter at the board. As the board now concedes, however, that holding must be confined to the specific statutory contours involved in that case.

Section 7121(e)(1), which governs grievances of *adverse actions*, provides that an employee's *election* to file a grievance waives that employee's right to seek relief from the board on that same matter or "similar matters arising under other personnel systems." 5 U.S.C. § 7121(e)(1); Pittman, 486 F.3d at 1282. As Russell argues in her brief unlike the petitioner in Pittman, she did not *elect* to grieve the reemployment issues per section 7121(e)(1) because the collective bargaining agreement required that she do so. Compare Pittman, 486 F.3d at 1278 ("The letter informed Pittman that he had a right to grieve his removal under the negotiated grievance procedure or to file an appeal to the Board, but that only one procedure could be elected.").

The board, in its brief, states that section 7121(e) applies in a USERRA case when the employee had the right to file a grievance or file an adverse action appeal and the employee elects to pursue grievance. Notably, in Pittman, this court did not dismiss for lack of jurisdiction Pittman's separate USERRA reemployment claim, the very claim now asserted by Russell. Instead, this court in Pittman addressed the reemployment claim on the merits, affirming the board's decision in that regard. See Pittman, 486 F.3d at 1279-1280 (finding substantial evidence to support the AJ's decision denying Pittman's reemployment claim). We agree with the parties that Pittman's jurisdictional holding regarding a challenge to a removal action does not control this case, which instead concerns a challenge to an alleged denial of reemployment due to transfer.

We also agree that the board should not have departed from its initial conclusion in Russell I that a CBA cannot require an employee to grieve a USERRA claim. In Russell I, the board found that the plain language of section 4302(b) cannot establish an additional prerequisite to the exercise of USERRA rights. Russell I, 104 M.S.P.R. at 19. The board explained that "the failure of the union and the agency to exclude USERRA claims from the coverage of the CBA, when considered in light of section 7121(a)'s exclusivity provision, amounts to an impermissible attempt to subordinate individual rights under USERRA to majoritarian collective bargaining processes." Id.

We find the board's reasoning in Russell I persuasive. CBA grievance procedure mechanisms clearly fall within the meaning of a "contract, agreement . . . or other matter" that cannot "reduce, limit, or eliminate" a petitioner's right to bring a USERRA reemployment claim at the board. Thus, as required by the plain language of section 4302(b), Russell's statutory right to appeal the reemployment matter to the board is not affected by the CBA's requirement that she file a grievance because the CBA cannot impose a requirement that the employee grieve a USERRA matter. USERRA's legislative history also confirms this result. See H.R. Rep. No. 103-65, at 20 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2453 ("Moreover, [section 4302(b)] would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required.").

Accordingly,

IT IS ORDERED THAT:

(1) The motion is granted.

(2) The decision of the board is vacated and the matter is remanded for consideration of Russell's petition for review.

(3) Each side shall bear its own costs.

FOR THE COURT

NOV 18 2008

Date

Jan Horbaly
Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

NOV 1 .

JAN HORBALY
CLERK

cc: Gregory J. O'Duden, Esq.
Calvin Morrow, Esq.
Meredyth D. Cohen, Esq.
Leslie Williamson, Esq.

a18

ISSUED AS A MANDATE: NOV 18 2008

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3106

ERMEA J. RUSSELL,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor.

Petition for review of the Merit Systems Protection Board in AT3443040915-B-1.

DYK, Circuit Judge, separate opinion.

I do not join the majority opinion because I am uncertain as to whether it is correct. All parties and the amici agree that the decision of the Board was incorrect. The unfortunate result is that no party or amicus has presented the opposing view. In a future case I think the court would benefit from such a presentation. My purpose here is to set forth the source of my doubts as to the correctness of the majority's holding.

Ermea Russell ("Russell") asserts that the Equal Employment Opportunity Commission ("agency") violated her rights to reemployment after military service under the Uniformed Services Employment and Reemployment Rights Act (USERRA). 38 U.S.C. §§ 4301-4334.[1] The union agreement provides for a grievance procedure applicable to USERRA claims. After unsuccessfully grieving the claim pursuant to the

[1] Russell's claim is based on the agency's decision to reassign her to a different city when reemploying her after active military duty.

collective bargaining agreement, Russell sought to assert her USERRA claim before the Merit Systems Protection Board ("Board").[2]

The Board ultimately held that it lacked jurisdiction because 5 U.S.C. § 7121(a) provides that the union grievance procedure is the exclusive remedy. On review, all parties and the majority agree that the Board's decision was incorrect. I am not so sure.

While I agree that our earlier decision in Pittman v. Dep't of Justice, 486 F.3d 1276 (Fed. Cir. 2007) does not decide this issue, the Civil Service Reform Act of 1978 on its face appears to make the union grievance procedure exclusive:

> (1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

5 U.S.C. § 7121(a) (emphases added). Thus, by the plain language of the statute, it appears that grievance procedures in the collective bargaining agreement are exclusive. The majority disagrees, holding that 38 U.S.C. § 4302(b) overrides the

[2] According to the parties, the collective bargaining agreement permitted her to grieve her reassignment, though on the very incomplete record presented by the parties, it is unclear under what specific language USERRA reemployment was subject to the grievance procedure. It is also unclear exactly how Russell asserted her claim in the grievance proceeding: the appellant claims that she argued that the reassignment was in violation of the collective bargaining agreement and "federal law." The grievance was ultimately denied by the agency, and the union chose not to invoke arbitration on her behalf.

exclusive nature of the collective bargaining agreement. That section of USSERA provides:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter [USERRA], including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

(emphases added). The problem with the majority's reasoning is that it is 5 U.S.C. § 7121(a) that makes the grievance procedure exclusive, not the collective bargaining agreement. The record here is unclear whether the collective bargaining agreement mentions that the grievance procedure is exclusive. But even if the collective bargaining agreement explicitly did provide that USERRA reemployment rights were exclusively subject to the grievance procedure, it seems that it would still be § 7121(a) that actually created the exclusivity.[3]

The Board argues nonetheless that USERRA (enacted in 1994) implicitly repealed the Civil Service Reform Act of 1978 (enacted in 1978) to the extent it would require USERRA rights to be vindicated exclusively through union grievance procedures. The Supreme Court has stated that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518, 2532 (2007) (internal quotation marks and alteration omitted). The Board appears to argue that the intention of the legislature is clear from the language "other matter" of 38

[3] The majority's reliance on the result in Pittman on the USERRA issue also seems misplaced. There is no mention in the Pittman opinion as to whether the contract permitted the employee to grieve USERRA violations.

U.S.C. § 4302. The majority does not rely on this reasoning, and I think this reasoning is questionable.

The language of the statute explicitly refers to "any State law," and makes no reference to federal law in § 4302(b). The explicit reference to "State" law and the absence of any reference to federal law suggest that this provision was not intended to implicitly repeal federal law. The legislative history cited by appellant refers only to the inability of collective bargaining agreements to waive reemployment rights; nothing in the legislative history cited by appellant states that § 4302(b) contemplated that federal law would be within the scope of the "other matters" superseded by USERRA.

Appellant's reading of USERRA is made even more troubling by the fact that the companion subsection of 38 U.S.C. § 4302, subsection (a), explicitly mentions both federal law and state law:

> Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law of ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(emphasis added.) The otherwise very similar language of the two provisions and the omission of any reference to "Federal law" suggests that federal law is not among the "other matter" referred to in subsection (b). On the other hand, it is troubling that judicial review may be unavailable as to USERRA claims that are subject to a grievance procedure.

Even if the parties' view makes sense as a policy matter, our task is to read jurisdictional statutes as they are written. One reading of the statute suggests that the Board and the majority are incorrect, and that the Board lacks jurisdiction.

PHOTOGRAPH THIS SHEET

DATE: November 14, 2008

SUBJECT: PRECEDENTIAL / NONPRECEDENTIAL OPINIONS AND ORDERS

1. The workload of the appellate courts precludes preparation of precedential opinions in all cases. Unnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort.

2. The purpose of a precedential disposition is to inform the bar and interested persons other than the parties. The parties can be sufficiently informed of the court's reasoning in a nonprecedential opinion.

3. Disposition by nonprecedential opinion or order does not mean the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law or would otherwise fail to meet a criterion in paragraph 4. Nonprecedential dispositions should not unnecessarily state the facts or tell the parties what they argued or what they otherwise already know. It is sufficient to tell the losing party why its arguments were not persuasive. Nonprecedential opinions are supplied to the parties and made available to the public.

4. The court's policy is to limit precedent to dispositions meeting one or more of these criteria:

(a) The case is a test case.

(b) An issue of first impression is treated.

(c) A new rule of law is established.

(d) An existing rule of law is criticized, clarified, altered, or modified.

APPENDIX D

P. 57

(e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.

(f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued.

(g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.

(h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth.

(i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.

(j) A new constitutional or statutory issue is treated.

(k) A previously overlooked rule of law is treated.

(l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise.

(m) The case has been returned by the Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court.

(n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.

5. When a nonprecedential opinion is approved by a majority of the panel and all panel votes are in, the authoring judge sends the opinion and any concurring or dissenting opinions to the administrative services office (ASO) for copying and delivery to the clerk for issuance. When all panel votes are in on a precedential opinion or order, the authoring judge circulates the opinion and any concurring or dissenting opinions, with a transmittal sheet, to each judge. A copy is also circulated to the senior technical assistant (STA), and the STA shall provide information on potential conflicts between the panel-approved opinion and any other prior opinions of the court or other relevant precedents. The nonpanel members of the court will have seven working days (twelve working days for opinions circulated during the summer period) to review a circulated precedential opinion or order. Nonpanel members may send comments to the authoring judge, to the panel, or to all judges. A nonpanel member judge in regular active service may submit a hold sheet pending a request for an en banc poll. Absent transmittal of a hold sheet or a request for an en banc poll during the circulation period, the authoring judge sends the opinion, and any concurring or dissenting opinions, to the ASO for copying and delivery to the clerk for issuance.

6. An election to utilize a Rule 36 judgment shall be unanimous among the judges of a panel. An election to issue a nonprecedential opinion shall be by a majority of a panel, except when the decision includes a dissenting opinion and the dissenting judge elects to have the decision issued as precedential. These election rights may be made at any time before issuance of an opinion.

7. A request of a panel member or a motion seeking reissuance of an issued opinion or order as a precedential disposition shall only be granted by a unanimous vote of the judges on the merits or motions panel that decided the case or matter. If such request or motion be granted, the author of the opinion shall revise it appropriately.

8. Nothing herein shall be interpreted as impeding the right of any judge to write a separate opinion.

22 December 2008

William B. Jolley
305 Burford Road
Brunswick, Georgia 31523
912-222-1660 or 912-267-7123

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Subject: Informal Petition for Panel Rehearing of 2008-3255, Jolley v. HUD

INTRODUCTION

This is an informal petition for panel rehearing in letter form as allowed by Federal Circuit Rule 40(f) and submitted within the 45 day time limit required by Federal Rule of Civil Procedure 40(a)(1) in a case where an agency of the United States is a party. Subject case was decided November 18, 2008. A copy of the opinion is attached as required by Federal Circuit Rule 40(f)(1).

Petitioner hereby certifies in accordance with F.R.A.P. Rule 25(d) that a copy of this appeal has been concurrently mailed, postage paid, to Roger A. Hipp, Trial Attorney, Commercial Litigation Branch, Civil Division, U. S. Department of Justice, 1100 L Street, N.W., Room 12124, Washington, D.C. 20530

The following paragraphs cover: a. **Question Presented**; b. **Pertinent Words of the Opinion**; c. **Argument**; and d. **Conclusion.**

APPENDIX L.

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Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Circuit Rule 32.1

Citing Judicial Dispositions

(a) Citation to Published Opinions and to Statutes. Citations to decisions of this court must be to the Federal Reporter. Dual or parallel citation of cases is not required. Citations of state court decisions included in the National Reporter System must be to that system in both the text and the table of authorities. Citations to all federal statutes, including those statutes applicable to the District of Columbia, must refer to the current official code or its supplement, or if there is no current official code, to a current unofficial code or its supplement. Citation to the official session laws is not required unless there is no code citation.

(b) Citation to Unpublished Dispositions.

(1) Unpublished Dispositions of this Court.

(A) Unpublished dispositions entered before January 1, 2002. Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

(B) Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.

(2) Unpublished Opinions of Other Courts. Unpublished dispositions of other courts of appeals and district courts entered before January 1, 2007, may be cited when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished

dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1.

(3) **Procedures Governing Citation to Unpublished Dispositions.** A copy of each unpublished disposition cited in a brief that is not available in a publicly accessible electronic database must be included in an appropriately labeled addendum to the brief. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

opinion has been approved by all three panel members concurring or dissenting opinions have been transmitted, or all members of the panel have had the time set forth in IOP 5.6.3 to write separate opinions. Absent a request for additional time, if the third judge has not timely responded, the draft opinion is circulated to the active judges of the court with the notation added to the opinion that the third judge has not joined in the opinion. Non-panel active judges must notify the authoring judge within eight (8) days if they desire en banc consideration. The circulation to non-panel active judges contains a request for notification if there is a desire for en banc consideration. Although senior judges do not have a vote on en banc, senior judges may choose to receive circulating opinions.

5.5.3 En banc Cases.

The time schedule set forth in IOP 5.5.2 and 5.5.3 is also followed in en banc cases, except that judges will give preposition of en banc opinions priority over preposition of panel opinions.

5.6 Filing of Opinions.

If, eight (8) days after the opinion is transmitted for circulation, insufficient votes for rehearing are received, the authoring judge transmits the original typescript to the Clerk for filing and notifies the author of any separate opinion to do likewise. The failure of a panel member to concur, dissent or to file a timely opinion does not delay the filing of the majority opinion or the entry of the judgment of this court.

5.7 Citations.

The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.

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IOP 5.7

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[Code of Federal Regulations]
[Title 5, Volume 3]
[Revised as of January 1, 2008]
From the U.S. Government Printing Office via GPO Access
[CITE: 5CFR1201.25]

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TITLE 5--ADMINISTRATIVE PERSONNEL

CHAPTER II--MERIT SYSTEMS PROTECTION BOARD

PART 1201_PRACTICES AND PROCEDURES--Table of Contents

Subpart B_Procedures for Appellate Cases

Sec. 1201.25 Content of agency response.

The agency response to an appeal must contain the following:

(a) The name of the appellant and of the agency whose action the appellant is appealing;

(b) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;

(c) All documents contained in the agency record of the action;

(d) Designation of and signature by the authorized agency representative; and

(e) Any other documents or responses requested by the Board.

APPENDIX F

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